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1982 ANNUAL CONFERENCE/CONFÉRENCE ANNUELLE DE 1982

May 30 - June 1/du 30 mai au 1 juin

Château Montebello

Montebello, Québec

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS:
IMPLICATIONS FOR HUMAN RIGHTS COMMISSIONS

LA CHARTE CANADIENNE DES DROITS ET LIBERTÉS:
RÉPERCUSSIONS POUR LES COMMISSIONS DES DROITS DE LA PERSONNE

Agenda/Ordre du jour

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SUNDAY, MAY 30

Registration of Delegates
Main Lobby

16:30-
18:30

DIMANCHE 30 MAI

Reception hosted by President
Confederation Mezzanine

20:30-
22:00

Inscription des délégués
Hall d'entrée

Réception offerte par le Président
Mezzanine Confédération

MONDAY, MAY 31

Registration of Delegates

Salle
Canada

08:00

Opening Remarks by President;
Introduction of Keynote Speaker

09:00

Keynote Speaker:

09:30

Minister of Justice of Canada

"THE CANADIAN CHARTER OF RIGHTS
AND FREEDOMS: IMPLICATIONS
FOR GOVERNMENTS"

Coffee Break

10:15

Panel Discussion

THE CHARTER OF RIGHTS: ITS
IMPACT ON HUMAN RIGHTS
COMMISSIONS

10:30

Moderator:

Gordon Fairweather
Chief Commissioner
Canadian Human Rights Commission;
President, CASHRA 1981-82

Panelists:

Fred J.E. Jordan, Q.C.
Acting Assistant Deputy Minister
(Public Law)
Department of Justice, Canada

Jim MacPherson
Coordinator of Constitutional Law
Department of the Attorney General
Government of Saskatchewan

Walter Tarnopolsky
Faculty of Law, University of Ottawa

LUNDI 31 MAI

Inscription des délégués

Mot d'ouverture du Président;
présentation du conférencier

Conférencier:

Ministre de la Justice du Canada

"LA CHARTE CANADIENNE DES DROITS
ET LIBERTÉS: RÉPERCUSSIONS POUR LES
GOUVERNEMENTS"

Pause-café

Débat

LA CHARTE DES DROITS: RÉPERCUSSIONS
POUR LES COMMISSIONS DES DROITS
DE LA PERSONNE

Animateur:

Gordon Fairweather
Président
Commission canadienne des droits
de la personne;
Président, ACOPSDH 1981-1982

Experts:

Fred J.E. Jordan, c.r.
Sous-ministre adjoint intérimaire
(droit public)
Ministère de la Justice, Canada

Jim MacPherson
Coordonnateur, droit constitutionnel
Ministère du Procureur général
Gouvernement de la Saskatchewan

Walter Tarnopolsky
Faculté de droit, Université d'Ottawa

Lunch

12:30-
14:00

Déjeuner

MONDAY, MAY 31

Concurrent Panel Discussions

Panel 1 - Salle Canada

ROLE OF STATUTORY AGENCIES;
ROLE OF APPOINTED COMMISSIONERS

14:00-
17:00

Moderator:

Ken Norman
Chief Commissioner
Saskatchewan Human Rights Commission

Panelists:

Francine Fournier
President
Québec Human Rights Commission

Dr. Noel Kinsella
Chairman
New Brunswick Human Rights Commission

Dr. Karl Friedmann
Ombudsman
Province of British Columbia

LUNDI 31 MAI

Débats simultanés

Débat 1 - Salle Canada

RÔLE DES ORGANISMES STATUTAIRES;
RÔLE DES COMMISSAIRES, NOMMÉS

Animateur:

Ken Norman
Président
Commission des droits de la
personne de la Saskatchewan

Experts:

Francine Fournier
Présidente
Commission des droits de la
personne du Québec

Dr. Noel Kinsella
Président
Commission des droits de la personne
du Nouveau-Brunswick

Dr. Karl Friedmann
Ombudsman
Province de la Colombie-Britannique

MONDAY, MAY 31

Panel 2 - Québec Room

SUPERVISION AND PLANNING OF
INVESTIGATIONS

14:00-
17:00

Moderator:

Claude Bernier
Director
Complaints and Compliance
Canadian Human Rights Commission

Panelists:

Tom Ebendorf
Director
Kentucky Human Rights Commission

Victor Marcuz
Supervisor
Toronto Central Region
Ontario Human Rights Commission

LUNDI 31 MAI

Débat 2 - Salon Québec

SUPERVISION ET PLANIFICATION
DES ENQUÊTES

Animateur:

Claude Bernier
Directeur
Direction des plaintes et de la mise en œuvre
Commission canadienne des droits de la personne

Experts:

Tom Ebendorf
Directeur
Commission des droits de la personne du Kentucky

Victor Marcuz
Surintendant
Région centrale de Toronto
Commission des droits de la personne de l'Ontario

TUESDAY, JUNE 1

Concurrent Panel Discussions

Panel 1 - Salle Canada

HUMAN RIGHTS INVESTIGATIONS AND
ACCESS TO INFORMATION AND PRIVACY
LEGISLATION

09:00-
10:30

MARDI 1^{er} JUIN

Débats simultanés

Débat 1 - Salle Canada

LES ENQUÊTES DANS LE DOMAINE DES
DROITS DE LA PERSONNE ET LES
LÉGISLATIONS EN MATIÈRE D'ACCÈS À
L'INFORMATION ET DE PROTECTION DE
LA VIE PRIVÉE

Moderator:

Inger Hansen, Q.C.
Privacy Commissioner
Canadian Human Rights Commission

Animateur:

Inger Hansen, c.r.
Commissaire à la protection de
la vie privée
Commission canadienne des droits
de la personne

Panelists:

Joseph Bérubé
Ombudsman
Province of New Brunswick

Experts:

Joseph Bérubé
Ombudsman
Province du Nouveau-Brunswick

Svend Robinson
NDP Member of Parliament

Svend Robinson
Député, NPD

David H. Flaherty
Professor of History and Law
University of Western Ontario

David H. Flaherty
Professeur d'histoire et de droit
Université de Western Ontario

Coffee Break

10:30 Pause-café
Salle Canada

TUESDAY, JUNE 1

Panel 2 - Quebec Room

SECTION 15 OF THE CHARTER:
MENTAL DISABILITY

09:00-
10:30

MARDI 1^{er} JUIN

Débat 2 - Salon Québec

ARTICLE 15 DE LA CHARTE:
HANDICAP MENTAL

Moderator:

David Smith, M.P.
Chairman
Special Committee on the Disabled
and the Handicapped

Animateur:

David Smith, M.P.
Président
Comité spécial concernant les
invalides et les handicapés

Panelists:

David Vickers
Lawyer, Victoria, B.C.;
Vice-President
Canadian Association for the
Mentally Retarded

Nicole Trudeau-Bérard
Vice-President
Quebec Human Rights Commission

Audrey Cole
Volunteer
Canadian Association for the
Mentally Retarded

Experts:

David Vickers
Avocat, Victoria, C.- B.;
Vice-président
L'Association canadienne pour
les déficients mentaux

Nicole Trudeau-Bérard
Vice-présidente
Commission des droits de la
personne du Québec

Audrey Cole
Volontaire
L'Association canadienne pour
les déficients mentaux

Coffee Break

10:30

Pause-café

Salle Canada

TUESDAY, JUNE 1

Panel Discussion

10:45-
12:30

SECTION 15 OF THE CHARTER:
AGE DISCRIMINATION

Salle
Canada

MARDI 1^{er} JUIN

Débat

ARTICLE 15 DE LA CHARTE:
DISCRIMINATION FONDÉE SUR L'ÂGE

Moderator:

Senator Florence Bird

Animateur:

Sénateur Florence Bird

Panelists:

Professor Jack London
Dean of the Faculty of Law
University of Manitoba

Allan Gillmore
Executive Director
Association of Universities
and Colleges of Canada

Richard Gingerich
National Secretary/Treasurer
Canadian Brotherhood of Railway,
Transport and General Workers

Experts:

Professeur Jack London
Doyen de la faculté de droit
Université du Manitoba

Allan Gillmore
Directeur général
Association des universités et
collèges du Canada

Richard Gingerich
Secrétaire/Trésorier national
Fraternité canadienne des Cheminots,
Employés des transports et autres
Ouvriers

Lunch

12:30-
14:00

Déjeuner

TUESDAY, JUNE 1

Keynote Speaker:

Eleanor Holmes Norton

"SYSTEMIC DISCRIMINATION -
THE AMERICAN EXPERIENCE"

Panel Discussion

"SYSTEMIC DISCRIMINATION -
THE CANADIAN EXPERIENCE"

Moderator:

Rita Cadieux
Deputy Chief Commissioner
Canadian Human Rights Commission

Panelists:

Shelagh Day
Director
Saskatchewan Human Rights Commission

Claude Bernier
Director
Complaints and Compliance
Canadian Human Rights Commission

Kathir Jeganathan
Chief Human Rights Officer
Nova Scotia Human Rights Commission

Coffee

14:00
Salle
Canada

14:45

Salle
Canada

MARDI 1^{ER} JUIN

Conférencière:

Eleanor Holmes Norton

"DISCRIMINATION SYSTÉMIQUE
EXPÉRIENCE VÉCUE AUX ÉTATS-UNIS"

(SUDOMIE)

Débat

"DISCRIMINATION SYSTÉMIQUE -
EXPÉRIENCE VÉCUE AU CANADA"

Animateur:

Rita Cadieux
Vice-présidente
Commission canadienne des
droits de la personne

Experts:

Shelagh Day
Directeur
Commission des droits de la
personne de la Saskatchewan

Claude Bernier
Directeur
Direction des plaintes et de
la mise en oeuvre
Commission canadienne des droits
de la personne

Kathir Jeganathan
Agent en chef des droits de la personne
Commission des droits de la personne
de la Nouvelle-Écosse

15:45

Pause-café

TUESDAY, JUNE 1

3 Concurrent Workshops

(each participant from panel
to act as a resource person)

16:00

Workshop #1 - Salle Canada

(simultaneous translation)

Workshop #2 - Quebec Room

(simultaneous translation)

Workshop #3 - Manitoba/Saskatchewan
Room

(no simultaneous translation)

Adjournment

17:30

MARDI 1^{er} JUIN

3 ateliers simultanés

(chacun des participants au débat
fait fonction de personne-resource)

Atelier n^o 1 - Salle Canada

(traduction simultanée)

Atelier n^o 2 - Salon Québec

(traduction simultanée)

Atelier n^o 3 - Salon Manitoba/Saskatchewan

(pas de traduction simultanée)

Reception and Dinner

Given by the Department of
Justice of Canada

Reception - Confederation
Mezzanine

Dinner - Salle Canada

Guest Speaker: Stephen Lewis
Broadcaster and
former politician

Introduction by:
- Honourable Flora MacDonald
PC Member of Parliament

Réception et Dîner

Offert par le ministère de la
Justice du Canada

Réception - Mezzanine Confederation

Dîner - Salle Canada

Conférencier: Stephen Lewis
Chroniqueur et
antérieurement politicien

Introduction par:
- L'honorable Flora MacDonald
Député, PC

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1982 CASHRA ANNUAL CONFERENCE



CONFERENCE ANNUELLE 1982 DE L'ACOSPDH

Final List of Delegates
and
Observers

Liste définitive des délégués
et
observateurs

Montebello, Québec
May 31 - June 2, 1982



Montebello (Québec)
du 31 mai au 2 juin 1982

NOTE

Please report any inaccuracies
that may appear in this list
to the Secretariat.

NOTA

Prière de saisir le Secrétariat
de toute erreur qui aurait pu
se glisser dans la liste.

1982 CASHRA ANNUAL CONFERENCE

CONFERENCE ANNUELLE 1982 DE L'ACOSPDH

May 31 to June 2, 1982

du 31 mai au 2 juin 1982

Montebello

Final List of Delegates and Observers
Liste définitive des délégués et observateurs

CANADA

Gordon Fairweather
Chief Commissioner/
Président

Martha Hynna
Secretary General/
Secrétaire général

Rita Cadieux
Vice-Présidente/
Deputy Chief Commissioner

Claude Bernier
Directeur, Plaintes et de
la mise en oeuvre/
Director, Complaints and
Compliance Branch

Inger Hansen
Privacy Commissioner/
Commissaire à la protection
de la vie privée

Gilles Pépin
Directeur de l'Information,
l'éducation et de la
coopération/
Director, Information,
Education & Cooperation

Walter Tarnopolsky
Commission Member/
Membre

Linda Poirier
Acting Director, Research
& Special Studies Branch/
Directeur par intérim,
Recherche et études
spéciales

Dorothy Richardson
Commission Member/
Membre

Malcolm MacDonell
Commission Member/
Membre

Gerry Van Berkel
General Counsel/
Avocat général

Yude Henteleff
Commission Member/
Membre

Yvon Tarte
Conseiller juridique/
Legal Counsel

Russell Juriansz
Legal Counsel/
Conseiller juridique

Leigh Woh-Peng
Director, Alberta &
Northwest Territories
Region/
Directeur, Région de
l'Alberta et des
Territoires du Nord-Ouest

Jeannie Thomas
Executive Assistant to
Chief Commissioner/
Adjoint exécutif au Président

George Hamelin
Chief Privacy Investigator/
Chef Investigateur

André Dumaine
Directeur par intérim
Région du Québec/
Acting Director,
Québec Region

ONTARIO

HUMAN RIGHTS COMMISSION

Borden Purcell
Chairman

Marie Marchand
Commissioner

Peter Cicchi
Commissioner

Toni Silberman
Executive Assistant
Public Affairs

Thea Herman
Legal Counsel

Jill Armstrong
Manager
Program Review & Design

Victor Marcuz
Supervisor
Toronto West

Colm Caffrey
Supervisor
Toronto East

Thérèse Legault
Supervisor
Eastern Region

Dan Welch
Supervisor
Northern Region

QUEBEC

COMMISSION DES DROITS DE LA PERSONNE DU QUEBEC

Nicole Trudeau-Bérard
Vice-présidente

Jacques Bergeron
Adjoint à la Présidente

NOVA SCOTIA - NOUVELLE-ÉCOSSE

HUMAN RIGHTS COMMISSION

Ernest Surette
Commissioner

Kathir Jeganathan
Chief Human Rights
Officer

NEW BRUNSWICK - NOUVEAU-BRUNSWICK

HUMAN RIGHTS COMMISSION
COMMISSION DES DROITS DE LA PERSONNE

Dan Ennis
Member/Membre

Michael O'Brien
Director/Directeur

MANITOBA

HUMAN RIGHTS COMMISSION

Dale Gibson
Chairperson

Lawrie Cherniak
Vice-Chairperson

Regina Bueno
Commissioner

Marek Debicki
Commissioner

John Lane
Commissioner

Maureen Miller
Commissioner

Jill Oliver
Commissioner

Sally Shrofet
Commissioner

Darlene Germsheid
Executive Director

BRITISH COLUMBIA - COLOMBIE-BRITANNIQUE

HUMAN RIGHTS COMMISSION

Charles Paris
Chairperson

Bijou Kartha
Commissioner

Gloria George
Commissioner

Renate Shearer
Commissioner

HUMAN RIGHTS BRANCH

Hanne Jensen
Director

April Katz
Chief of Compliance

PRINCE EDWARD ISLAND - ILE-DU-PRINCE-EDOUARD

HUMAN RIGHTS COMMISSION

Allan MacDonald
Chairperson

Thomas Klewin
Executive Director

SASKATCHEWAN

HUMAN RIGHTS COMMISSION

Ken Norman
Chief Commissioner

Helen Hnatyshyn
Commission Member

Gordon DeMarsh
Commission Member

Kayla Hock
Commission Member

Shelagh Day
Director

Marty Schreiter
Assistant Director

Mickey Woodard
Staff Counsel

Nadine Bogren
Affirmative Action Officer

ALBERTA

HUMAN RIGHTS COMMISSION

Marlene Antonio
Chairman

Rollie Miles
Commissioner

Sheryl Wowk
Commissioner

Jack Tutty
Executive Director

Denis St. Arnaud
Regional Director

Tricia Smith
Supervisor

Pat Sherbin
Public Affairs Officer

NEWFOUNDLAND - TERRE-NEUVE

HUMAN RIGHTS COMMISSION

Abraham Schwartz
Chairman

Herbert Buckingham
Commissioner

Fred Coates
Director

NORTHWEST TERRITORIES - TERRITOIRES-DU-NORD-OUEST

Eric Smith
Head, Labour Services
Department of Justice
and Public Services

YUKON

Padraig O'Donoghue
Deputy Minister
Department of Justice

OBSERVERS - OBSERVATEURS

Martin Low
General Counsel
Human Rights Section
Department of Justice

Christine Blain
Office of the Coordinator
Status of Women

Dick Nolan
Director
Human Rights Directorate
Secretary of State

Desmond Fitzmaurice
Director
Anti-Discrimination
Directorate
Public Service Commission

Lucie Pépin
Présidente
Conseil consultatif canadien
Situation de la femme

Elizabeth McAllister
Chief
Affirmative Action Branch
Canada Employment and
Immigration Commission

Peter Robertson
Washington, D.C.

Magda Seydegart
Executive Administrator
Human Rights Research and
Education Centre
University of Ottawa

Laura Metrick
Department of
Intergovernmental Affairs
Government of Ontario

Mark Berlin
Human Rights Branch
Secretary of State

Gerald Rayner
Senior Assistant
Under Secretary
Secretary of State

Enid Page
Human Rights Branch
Secretary of State

CANADIAN INTERGOVERNMENTAL CONFERENCE SECRETARIAT
SECRETARIAT DES CONFERENCES INTERGOUVERNEMENTALES CANADIENNES

Pierre-Luc Perrier
Conference Secretary/Secrétaire de la conférence

1982 CASHRA ANNUAL CONFERENCE



Biographical Notes

Montebello, Québec
May 31 - June 2, 1982

JEAN CHRETIEN, minister of justice and member of Parliament for St-Maurice, is also attorney general, minister of state for Social Development and was the minister responsible for constitutional negotiations.

Chrétien studied law at Université Laval and practiced law in Shawinigan before being elected in 1963. During his six terms in office he has also served as ministers of indian affairs, industry, as the first francophone minister of finance, and as president of the Treasury Board.

GORDON
FAIRWEATHER

was appointed chief commissioner of the Canadian Human Rights Commission in 1977. He was elected first to the New Brunswick Legislature in 1952, where he served as attorney general between 1958 and 1960, then to the House of Commons as Member for Fundy Royal in 1962. He was re-elected five times, resigning his seat to join the Commission in 1977.

In 1980 Fairweather served on the 11-member Commonwealth Observer group for the Zimbabwe independence elections. He is an officer of the Order of Canada.

FREDERICK
JORDAN

has been acting assistant deputy minister for Public Law with the federal department of justice since September, 1981. Since joining the department in 1971 he has been directly involved with constitutional law and revisions to the Constitution.

Prior to joining the justice department, Jordan was a professor of law at Queen's University and at Carleton University. He is a graduate of the Universities of B.C. and Michigan.

JAMES
MACPHERSON

is coordinator of constitutional law for the Saskatchewan government, on leave from the University of Victoria. He served on B.C. human rights boards of inquiry and as a consultant to the Pépin-Robarts Task Force on the Constitution.

MacPherson is a graduate of Dalhousie and Cambridge University Law Schools and taught law at the University of Victoria and at Osgoode Hall Law School.

WALTER
TARNOPOLSKY

is director of the University of Ottawa's Human Rights Research and Education Centre and a member of the Canadian Human Rights Commission and the United Nation's Human Rights Committee. He acted as a consultant to the Manitoba Law Reform Commission on the provincial bill of rights, and to the federal department of justice on the Canadian Human Rights Act. Between 1977 and 1981 he was president of the Canadian Civil Liberties Association.

Tarnopolsky has written numerous articles on civil liberties, multiculturalism and related issues, and published two books, The Canadian Bill of Rights, and Discrimination and the Law in Canada.

KEN NORMAN,

chief commissioner of the Saskatchewan Human Rights Commission, is a law professor at the University of Saskatchewan. He is a member of the Canadian Advisory Council of Amnesty International and the National Council of the Canadian Human Rights Foundation. He has served as counsel to the Saskatchewan Office of the Ombudsman and to the Canadian Indian Claims Commission. Norman is a graduate of the University of Saskatchewan and of Oxford.

FRANCINE FOURNIER, the current president of the Québec Human Rights Commission, has served as the commission's vice president and research director and, from 1973 to 1976, as secretary general of Quebec's status of women council.

Fournier earned a masters in political science from the Université de Montréal, where she taught for six years. She has published several research papers, particularly on the status of women in Québec.

NOEL
KINSELLA,

chairman of the New Brunswick Human Rights Commission, is currently academic vice president of St. Thomas University, Fredericton, where he has taught psychology, philosophy and human rights since 1965.

Kinsella is on the Advisory Council of the Canadian Human Rights Foundation, served two terms as CASHRA president and was a member of Canada's U.N. Human Rights Commission delegation. He is a professional psychologist and a graduate of University College, Dublin, and St. Thomas University (Angelicum), Rome. He has published three books and many articles on human rights and on psychology.

DR. KARL
FRIEDMANN,

B.C.'s ombudsman, has an ongoing research interest in the ombudsman function. He has undertaken extensive research into ombudsman offices world-wide, and has developed methods for evaluating performance, efficiency and workload in Canadian ombudsmen's offices.

Friedmann studied at the University of Heidelberg, the Free University of Berlin and the London School of Economics. Following research at Oxford he was awarded his PhD from Heidelberg.

CLAUDE BERNIER director of the Canadian Human Rights Commission's complaints and compliance branch, joined the CHRC as an equal pay specialist in 1978. She developed the procedures for handling complaints concerning equal pay for work of equal value. Bernier, who studied administration and industrial relations in Québec City, was Radio Canada's Québec manager of human resources and was personnel manager for the Olympic Radio-Television Organization between 1974 to 1976.

THOMAS
EBENDORF

has been compliance director of the Kentucky Commission on Human Rights for 14½ years. He directs the complaints section's daily operations, conducts conciliation negotiations, represents the commission before appellate courts and counsels employers, unions and civil rights groups.

Prior to joining the Kentucky Commission, Ebendorf worked for the Kansas commission and the City of Topeka Human Relations Commission. He is a graduate of the University of Louisville (in law) and of Kansas University (in education).

VICTOR
MARCUZ

supervisor of the Ontario Human Rights Commission's Toronto West region, has investigated human rights complaints since he joined the commission in 1975. He was formerly a private investigator with a law firm specializing in civil litigation, and between 1962 and 1969, a police officer with the Toronto and Windsor police forces.

Marcuz is a graduate in sociology and psychology from the University of Windsor.

INGER HANSEN

is the privacy commissioner of the Canadian Human Rights Commission. Prior to her appointment Hansen was correctional investigator and functioned as a penitentiary ombudsman, investigating and reporting on inmates complaints. During four years with the department of the solicitor general she prepared papers on criminal law and the female offender and advised the ministry on matters involving the penitentiary service and inmates rights.

Hansen received her law degree from the University of British Columbia, was called to the B.C. Bar in 1961 and had a private practice in Vancouver.

JOSEPH BERUBE,

appointed New Brunswick's fourth ombudsman in 1976, practiced law in the province until his appointment as a provincial court judge in 1965.

Berubé is director of the International Ombudsman Institute, a member of the Canadian Human Rights Foundation's national council, and is on the advisory board of the International Bar Association's ombudsman committee.

SVEND
ROBINSON,

member of Parliament for Burnaby, is the New Democratic Party's justice and human rights spokesperson. He is a member of the Standing Committees on Justice and Legal Affairs and on Regulations and Other Statutory Instruments. Robinson also served on the Special Joint Committee on the Constitution, where

Robinson attended law school at U.B.C. where he was the first student elected to the Board of Governors, and the London School of Economics.

DAVID FLAHERTY is a professor of history and law at the University of Western Ontario. His research and teaching fields include Canadian legal history, American legal and constitutional history and privacy and data collection. Flaherty has published several books and many articles on data protection and participated in national and international conferences including the 3rd and 4th annual meetings of Data Protection Commissioners.

Flaherty is a graduate of the University of Alberta McGill and Columbia where he earned his masters degree and doctorate.

DAVID SMITH,

member of Parliament for Don Valley East, is chairman of the Special Committee on the Disabled and the Handicapped. The committee's report, Obstacles, identified the key barriers faced by people with disabilities in Canada, and made 130 recommendations concerning the disabled's access to facilities, education, employment and an independent lifestyle.

Smith has served as a Toronto alderman, president of the Toronto City Council and as deputy mayor. He was executive assistant to both Walter Gordon and John Turner. He graduated from Carleton University and received his law degree from Queen's University, where he also lectured in Canadian politics.

DAVID VICKERS

is currently vice-president of the Canadian Association for the Mentally Retarded and has served in various capacities on the national, provincial and regional associations for people with mental disabilities.

Vickers, now in private law practice in Victoria, is a graduate of Sir George Williams College and the University of British Columbia. He was deputy attorney-general of the province from 1973 to 1977 and has served as president of the Legal Aid Society and on the National Council of the Canadian Bar Association.

NICOLE TRUDEAU-BERARD

is vice president of the Québec Human Rights Commission, the first Canadian commission to administer an act outlawing discrimination on the ground of mental handicap.

A law graduate of the Université de Montréal, Berard was assistant secretary general of the university from 1974 to 1981, served on the Québec government's Anger Commission on the future of higher education and universities, and as a researcher for the federal law reform commission.

AUDREY COLE

has been an active member of the Association for the Mentally Retarded for 15 years, serving on the Ontario board of directors, and as chairperson of its Standards and Evaluation Committee. Cole is a member of the national Involvement/Advocacy Committee and represents the national association on the Planning Committee of the National Associations Active in Criminal Justice.

FLORENCE BIRD was summoned to the Senate in 1978. She was chairman of the Royal Commission on the Status of Women in Canada from 1967 to 1970 and a consultant to the CBC's Task Force on the Status of Women in 1974.

Under her professional name, Anne Francis, Bird was an award-winning journalist and CBC news analyst on national and international affairs between 1946 and 1966. She has published two books.

JACK LONDON is dean of law at the University of Manitoba where he teaches taxation law. He has a consulting practice primarily in tax litigation, human rights advocacy and arbitration and mediation services. He is a regular radio and TV commentator and newspaper columnist.

London was chairperson of the first board of adjudication set up in Manitoba to hear a complaint against mandatory retirement. He also argued successfully on behalf of Aubrey Newport in the appeal court hearings which resulted in Newport being reinstated as clerk of the Manitoba court.

ALLAN GILLMORE is executive director of the Association of Colleges and Universities of Canada. He served as the vice-rector, administration, University of Ottawa between 1966 and 1980, and as assistant to the Saskatchewan minister of education where he was responsible for drafting legislation establishing the Wascana Centre.

Gillmore was first executive director of the Wascana Centre, a joint Saskatchewan/Regina/University development project for the city centre.

RICHARD
GINGERICH

is national secretary-treasurer of the Canadian Brotherhood of Railway, Transport and General Workers. He has served in various capacities in the Ontario Federation of Labour, the Canadian Labour Congress, and the New Democratic Party.

Gingerich was an executive member of the Canadian Institute of Public Affairs between 1963 and 1968, and a member of Conestoga College's board of governors--including a two-year term as vice chairman of the board.

ELEANOR HOLMES
NORTON

is the first woman to chair the United States Equal Employment Opportunity Commission where she served from 1977 until 1981. Norton, now professor of law at Georgetown Law Centre in Washington, D.C., is recognized as an authority on such employment discrimination issues as affirmative action and comparable worth.

Prior to her appointment to the EEOC, Norton was chairperson of the New York City Commission on Human Rights. She is a graduate of Yale's graduate and law schools and Antioch College, and co-author of Sex Discrimination and the Law: Causes and Remedies.

RITA CADIEUX,

deputy chief commissioner of the Canadian Human Rights Commission, has worked with minority and disadvantaged groups as a community worker, social development officer and administrator of social programs. Cadieux represented Canada at the 24th session of the U.N. General Assembly in 1969 and on the U.N. Commission on the Status of Women between 1973 and 1976. Prior to her appointment to the CHRC, Cadieux was the director of the CBC's office of equal opportunity.

Cadieux obtained her masters degree in social work from McGill. She did further graduate work at McGill and at Case Western University in Cleveland, Ohio.

KATHIR JEGANATHAN

is chief human rights officer with the Nova Scotia Human Rights Commission, a position he has held for the past ten years. Before immigrating to Canada in 1971, he practised law in Sri Lanka (Ceylon) for ten years.

SHELAGH DAY

is director of the Saskatchewan Human Rights Commission and the publisher of the Canadian Human Rights Reporter. She has worked in the human rights field with the women's action group at University of British Columbia, Capilano College, the faculty association at University of British Columbia, the B.C. Human Rights Branch, the City of Vancouver and, most recently, the Saskatchewan Human Rights Commission.

Day is Saskatchewan's delegate on the Federal-Provincial Committee of Officials Responsible for Human Rights and recently attended the meeting of the UN Commission on Human Rights as a member of Canada's delegation.

STEPHEN LEWIS, former Ontario New Democratic Party MLA, was leader of the Opposition from 1975 until he stepped down in 1978. He is currently doing daily social and political commentary on radio and TV and is co-host of TV Ontario's new public affairs program "Quarters".

Lewis serves as a union nominee on labour arbitration boards, as a consultant to the Council for Yukon Indians, and is chairman of INTER PARES, a private Canadian organization involved in third-world development projects.

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DOCUMENT: 840-224/004



CONFERENCE ANNUELLE 1982 DE L'ACOSPDH

Notes biographiques

Montebello (Québec)
du 31 mai au 2 juin 1982

JEAN CHRETIEN

Jean Chrétien, qui cumule, en plus de son mandat de député de Saint-Maurice, les fonctions de ministre de la Justice, de Procureur général du Canada et de ministre d'Etat au Développement social, a été aussi le ministre responsable des pourparlers sur la constitution.

Monsieur Chrétien a fait ses études de droit à l'Université Laval et a exercé la profession d'avocat à Shawinigan avant d'être élu député en 1963. Il a en outre, après avoir remporté six élections, détenu les portefeuilles des Affaires indiennes et de l'Industrie et a été le premier francophone à accéder aux postes de ministre des Finances, après avoir occupé les fonctions de président du Conseil du Trésor.

Gordon
Fairweather

Gordon Fairweather a été nommé président de la Commission canadienne des droits de la personne en 1977. Élu pour la première fois, en 1952, député à l'Assemblée législative du Nouveau-Brunswick, il occupe le poste de procureur général de la province de 1958 à 1960 puis est élu, en 1962, député de Fundy-Royal à la Chambre des communes. Réélu cinq fois par la suite au Parlement fédéral, il résigne son mandat en 1977 pour se joindre à la Commission. En 1980, il est choisi pour faire partie des 11 membres du Commonwealth Observer group chargés de suivre le déroulement de la consultation populaire sur l'indépendance au Zimbabwe. M. Fairweather est membre de l'Ordre du Canada.

Frederick
Jordan

Frederick Jordan est Sous-ministre adjoint par intérim à la section du droit public du ministère de la Justice du Canada, depuis septembre 1981. Il travaille dans ce ministère depuis 1971 et ses attributions touchent directement le droit constitutionnel, notamment les modifications à la Constitution.

Avant d'entrer au ministère de la Justice, M. Jordan a été professeur de droit à l'Université Queen's et à l'Université Carleton. Il est diplômé de l'Université de la Colombie-Britannique et de l'Université du Michigan.

James
MacPherson

James MacPherson est coordonnateur en matière de droit constitutionnel auprès du gouvernement de la Saskatchewan. Il a siégé à des commissions d'enquête sur les droits de la personne en Colombie-Britannique et a fait fonction d'expert conseil auprès de la Commission Pépin-Robarts sur l'unité canadienne.

Il est diplômé des facultés de droit de l'Université Dalhousie et de l'Université de Cambridge et a enseigné le droit à l'Université de Victoria et à l'Osgoode Hall Law School.

Walter
Tarnopolsky

Walter Tarnopolsky est directeur du Centre de recherche et d'enseignement sur les droits de la personne de l'Université d'Ottawa et membre de la Commission canadienne des droits de la personne de même que du Comité des Nations Unies sur les droits de l'homme. Expert-conseil auprès de la Commission de réforme du droit du Manitoba chargée de l'étude de la Déclaration provinciale des droits, et auprès du ministère fédéral de la Justice lors de la rédaction de la Loi canadienne sur les droits de la personne, il a assumé la présidence de l'Association canadienne des libertés civiles de 1977 à 1981.

Auteur de nombreux articles sur les droits civils, sur le multiculturalisme et sur des questions connexes, Monsieur Tarnopolsky a publié deux ouvrages, "The Canadian Bill of Rights", et "Discrimination and the Law".

Ken Norman

Ken Norman est président de la Commission des droits de la personne de la Saskatchewan et professeur de droit à l'Université de la Saskatchewan. Membre du Conseil consultatif canadien d'Amnistie internationale et du Conseil national de la Fondation canadienne des droits de l'homme, il a été conseiller juridique auprès du bureau de l'Ombudsman de la Saskatchewan et de la Commission canadienne d'étude des revendications des Indiens. M. Norman est diplômé de l'Université de la Saskatchewan et de l'Université d'Oxford.

Francine Fournier

Présidente actuelle de la Commission des droits de la personne du Québec, elle a assumé les fonctions de vice-présidente et de directrice de la recherche à la Commission; de 1973 à 1976, elle a agi comme secrétaire générale du Conseil du statut de la femme du Québec.

Madame Fournier a obtenu une maîtrise et la scolarité d'un doctorat en sciences politiques de l'Université de Montréal, où elle a enseigné pendant six ans. Elle a publié plusieurs documents de recherche, notamment sur la situation des femmes au Québec.

Noel Kinsella

Noel Kinsella, le président de la Commission des droits de la personne du Nouveau-Brunswick, est actuellement vice-président de l'université St. Thomas, à Fredericton, où il enseigne la psychologie, la philosophie et les droits de la personne depuis 1965.

Monsieur Kinsella siège au Conseil consultatif de la Fondation canadienne des droits de l'homme. Il a en outre occupé la présidence de l'Association canadienne des organismes statutaires pour la protection des droits de la personne et a fait partie de la délégation canadienne de la Commission des droits de l'homme des Nations Unies. Diplômé de l'University College de Dublin et de l'Université Saint-Thomas (Angelicum) de Rome, il exerce la profession de psychologue. Il a publié trois ouvrages et de nombreux articles dans les domaines des droits de la personne et de la psychologie.

Karl Friedmann Karl Friedmann occupe le poste d'ombudsman en Colombie-Britannique et s'intéresse de très près à cette fonction. En effet, il a non seulement effectué des recherches sur les formes que celle-ci revêt dans divers pays à travers le monde, mais il a également mis au point des méthodes permettant d'évaluer le rendement, l'efficacité et la charge de travail des bureaux d'ombudsman au Canada.

Karl Friedmann a fait ses études à l'Université de Heidelberg, à l'Université libre de Berlin et à la London School of Economics. Les recherches qu'il avait effectuées à Oxford lui ont permis d'obtenir un doctorat de l'Université de Heidelberg.

Claude Bernier Chef de la Direction des plaintes et de la mise en application de la Commission canadienne des droits de la personne, M^{me} Bernier est entrée à la CCDP en 1978 comme spécialiste des questions d'égalité salariale. C'est d'ailleurs en cette qualité qu'elle a été amenée à élaborer des lignes de conduite pour l'examen de plaintes touchant au principe de l'égalité de rémunération pour des fonctions équivalentes. Après des études en administration et en relations industrielles, à l'Université Laval, elle a été directrice des ressources humaines à Radio-Canada à Québec avant d'occuper, de 1974 à 1976 le poste de directrice du personnel auprès de l'Organisme de radio-télévision des Olympiques, de 1974 à 1976.

Thomas Ebendorf M. Ebendorf est directeur de la mise en oeuvre de la Commission des droits de la personne du Kentucky depuis 14½ ans. Il dirige les opérations quotidiennes de la section des plaintes, mène les négociations entreprises dans le cadre de la conciliation, représente la commission devant les cours d'appel et conseille les employeurs, les syndicats et les groupes de défense des droits civils.

Avant de travailler pour la Commission du Kentucky, M. Ebendorf a travaillé pour la Commission du Kansas et la Human Relations Commission de la municipalité de Topeka. Il est diplômé de l'université de Louisville (en droit) et de l'université du Kansas (en éducation).

Victor Marcuz

Superviseur à la Commission ontarienne des droits de la personne dans la région ouest de Toronto, il étudie les plaintes en matière des droits de la personne depuis son arrivée à la Commission en 1975. Auparavant, il a travaillé comme détective privé dans un cabinet d'avocats spécialisé dans les litiges civils et de 1962 à 1969, il a travaillé comme policier dans les forces de l'ordre à Toronto et à Windsor.

Victor Marcuz est détenteur d'un diplôme en sociologie et psychologie de l'université de Windsor.

Inger Hansen

Inger Hansen est commissaire à la protection de la vie privée à la Commission canadienne des droits de la personne. Avant d'être nommée à ce poste, elle a été enquêteuse correctionnelle et, en tant que protectrice des droits des détenus, elle était habilitée à instruire les plaintes des détenus et à en faire rapport au Solliciteur général. Pendant les quatre ans où elle a travaillé au ministère du Solliciteur général, elle a réalisé une série d'études sur le droit criminel et sur les délinquantes et a fait fonction de conseillère auprès du Ministre pour les questions touchant le service pénitentiaire et les droits des détenus.

Mme Hansen, qui est diplômée en droit de l'Université de la Colombie-Britannique, a été reçue au barreau de cette province en 1961, et a eu pendant un certain temps une étude privée à Vancouver.

Joseph Bérubé

La quatrième ombudsman à être nommée au Nouveau-Brunswick en 1976, M. Bérubé a exercé le droit dans cette province jusqu'à sa nomination à la magistrature provinciale en 1965.

M. Bérubé est directeur du International Ombudsman Institute, membre du conseil national de la Fondation canadienne des droits de l'homme et du conseil consultatif du comité ombudsman de l'Association internationale du barreau.

Svend Robinson

Svend Robinson est député de Burnaby à la Chambre des communes et porte-parole du Nouveau parti démocratique en matière de justice et de droits de la personne. Il est membre du Comité permanent de la justice et des questions juridiques ainsi que du Comité sur les règlements et autres textes réglementaires. Il a également fait partie du Comité mixte spécial du Sénat et de la Chambre des communes sur la Constitution du Canada.

Svend Robinson a fait ses études de droit à l'Université de la Colombie-Britannique, où il a été le premier étudiant à être élu au conseil d'administration, et a ensuite fréquenté la London School of Economics.

David Flaherty

David Flaherty est professeur d'histoire et de droit à l'Université Western Ontario. Le champ d'application de ses recherches et de son enseignement couvre l'histoire du droit au Canada, l'histoire du droit général et du droit constitutionnel aux Etats-Unis, et la protection de la vie privée et la collecte de renseignements. Il a publié plusieurs ouvrages et de nombreux articles sur la protection des renseignements et a participé à des conférences nationales et internationales, y compris les 3^e et 4^e assemblées annuelles des commissaires à la protection des renseignements.

Le professeur Flaherty est diplômé de l'Université de l'Alberta, à Edmonton, et est titulaire d'une maîtrise de l'Université McGill et d'un doctorat de l'Université Columbia.

David Smith

David Smith est député de Don Valley-Est à la Chambre des communes et président du Comité spécial sur les invalides et les handicapés. Ce comité est l'auteur du rapport Obstacles où se trouvent exposés d'une part, les principaux obstacles que doivent affronter les personnes handicapées au Canada et, d'autre part, une série de 130 recommandations traitant des conditions d'accès des handicapés à diverses installations, à l'éducation, à l'emploi et à un mode de vie indépendant.

David Smith a été conseiller municipal, président du Conseil municipal et maire adjoint de Toronto. Il a été également chef de cabinet auprès de M. Walter Gordon et de M. John Turner. Ancien étudiant de l'Université Carleton, il est titulaire d'un diplôme en droit de l'Université Queen's où il a également donné des cours sur la politique canadienne.

David Vickers

David Vickers, actuellement vice-président de l'Association canadienne pour les déficients mentaux, a occupé divers postes au sein d'associations nationales, provinciales et régionales de personnes mentalement handicapées.

Avocat de pratique privée à Victoria, il a fréquenté l'Université Sir George Williams et l'Université de la Colombie-Britannique. Procureur général adjoint de la Colombie-Britannique, de 1973 à 1977, il a été président de la Legal Aid Society et du Conseil national de l'Association du barreau canadien.

Audrey Cole

Audrey Cole oeuvre depuis 15 ans au sein de l'Association pour les déficients mentaux. Membre du conseil d'administration de la section ontarienne, elle est présidente du comité des normes et d'évaluation de l'association que, par ailleurs, elle représente auprès du comité de planification de la National Associations Active in Criminal Justice. Mme Cole siège également au National Involvement/Advocacy Committee.

Nicole
Trudeau-Bérard

Vice-présidente de la Commission des droits de la personne du Québec, la première commission au Canada à administrer une loi qui interdit la discrimination fondée sur le handicap mental.

Diplômée en droit de l'Université de Montréal, Madame Bérard a assumé les fonctions de secrétaire générale adjointe de l'université de 1974 à 1981; membre de la Commission gouvernementale Anger (du Québec) portant sur l'avenir de l'enseignement supérieur et des universités; elle a été recherchiste à la commission fédérale de réforme du droit.

Florence Bird

Florence Bird a été nommée sénateur en 1978. Elle a été présidente de la Commission royale d'enquête sur la situation de la femme au Canada, de 1967 à 1970, et elle a fait fonction d'expert-conseil auprès du Groupe d'étude sur la condition de la femme de la Société Radio-Canada, en 1974.

Connue professionnellement sous le nom d'Anne Francis, c'est une ancienne journaliste qui a remporté un certain nombre de prix et de récompenses et qui a été commentatrice de nouvelles nationales et internationales à la Société Radio-Canada, de 1946 à 1966. Elle a publié deux livres.

Jack London

Jack London est le Doyen de la faculté de droit de l'Université du Manitoba où il enseigne le droit fiscal. Il exerce en qualité d'expert-conseil principalement dans les domaines des litiges relatifs aux impôts, à la défense des droits de la personne et l'arbitrage des conflits du travail. Il collabore régulièrement à des émissions de radio et de télévision à titre de commentateur et rédige des articles dans les journaux.

Monsieur London a présidé le premier conseil d'arbitrage mis sur pied au Manitoba pour entendre une plainte contre la retraite obligatoire. Il a aussi plaidé avec succès en faveur d'Aubrey Newport en cour d'appel, obtenant qu'elle soit réintégrée dans son poste de greffier du tribunal du Manitoba.

Richard Gingerich

M. Gingerich est secrétaire-trésorier national de la Fraternité canadienne des cheminots, employés de transports et autres ouvriers. Il a servi à divers titres au sein de la Fédération du travail de l'Ontario, du Congrès du travail du Canada et du Nouveau parti démocratique.

Il a été membre de l'exécutif de l'Institut canadien des affaires publiques de 1963 à 1968, et membre du conseil des gouverneurs du collège Conestoga - dont il a assumé la vice-présidence pendant deux ans.

Allan Gillmore

M.Gillmore est directeur exécutif de l'Association des collèges et universités du Canada. Il a été vice-recteur de l'administration à l'université d'Ottawa de 1966 à 1980 et a travaillé comme adjoint du ministre de l'éducation de la Saskatchewan où il a été chargé de rédiger la loi établissant le Centre Wascana.

M.Gillmore a été le premier directeur exécutif du centre Wascana, un projet de développement du centre-ville élaboré conjointement par la province de la Saskatchewan, l'université de Régina et la municipalité de Régina.

Eleanor Holmes Norton Eleanor Holmes Norton a été la première femme à être nommée à la présidence de la United States Equal Employment Opportunity Commission (Commission américaine de l'égalité d'accès à l'emploi), poste qu'elle a occupé de 1977 à 1981. Professeur de droit au Georgetown Law Centre à Washington, D.C., elle a la réputation d'être une experte des questions ayant trait à la discrimination au travail, comme le redressement progressif et l'égalité salariale.

Avant d'être nommée présidente de la Commission de l'égalité d'accès à l'emploi, elle a été présidente de la Commission des droits de la personne de New-York. Diplômée de la Yale's Graduate and Law schools et de l'Antioch College, elle est coauteur de l'ouvrage Sex Discrimination and the Law : Causes and Remedies.

Rita Cadieux Rita Cadieux est vice-présidente de la Commission canadienne des droits de la personne. Sa carrière professionnelle s'est déroulée auprès de groupes minoritaires et défavorisés soit comme travailleuse communautaire, soit comme agent de développement social ou administrateur de programmes sociaux. Elle a représenté le Canada à la 24^e session de l'Assemblée générale des Nations Unies en 1969 ainsi qu'à la Commission de la condition de la femme des Nations Unies, de 1973 à 1976. Avant d'entrer à la CCDP, M^{me} Cadieux a été directrice du Bureau de l'égalité des chances à la Société Radio-Canada.

M^{me} Cadieux a obtenu une maîtrise en service social de l'Université McGill et a fait des études post-maîtrise à cette même université ainsi qu'à l'Université Case Western de Cleveland, en Ohio.

Kathir Jeganathan Agent en chef des droits de l'homme à la Commission des Droits de l'Homme de la Nouvelle-Ecosse, poste qu'il occupe depuis dix ans. Avant d'immigrer au Canada en 1971, il avait pratiqué le droit au Sri Lanka (Ceylan) pendant dix ans.

Shelagh Day

Shelagh Day est directrice de la Commission des droits de la personne de la Saskatchewan et rédactrice en chef du Canadian Human Rights Reporter. Elle a oeuvré dans le domaine des droits de la personne au sein de groupements féminins de l'Université de la Colombie-Britannique, du Capilano College, de l'association des professeurs de l'Université de la Colombie-Britannique, de la Direction des droits de la personne de la ville de Vancouver, et plus récemment, de la Commission des droits de la personne de la Saskatchewan.

Mme Day représente la Saskatchewan au sein du Comité fédéral-provincial de fonctionnaires chargés des droits de la personne et elle a récemment participé, en tant que membre de la délégation canadienne, aux réunions de la Commission des droits de l'homme des Nations Unies.

Stephen Lewis

Stephen Lewis est un ancien député néo-démocrate à l'Assemblée législative de l'Ontario où il a été chef de l'Opposition de 1975 à 1978. Il est actuellement commentateur d'affaires politiques et sociales à la radio et à la télévision et coanimateur de la nouvelle émission d'affaires publiques, "Quartets", diffusée par TV Ontario.

M. Lewis représente des syndicats au sein de conseils arbitraux du travail, fait fonction d'expert-conseil auprès du Conseil des Indiens du Yukon et préside le conseil d'administration d'INTER PARES, organisme privé canadien qui participe à des projets de développement dans les pays du Tiers-Monde.



1982 CASHRA ANNUAL CONFERENCE

The New Charter of Rights and Freedoms

(Extract from an overview paper)

Walter S. Tarnopolsky

Professor of Law
University of Ottawa
and

Director of Human Rights Research and Education Centre

Panel: The Charter of Rights: Its impact on Human
Rights Commissions

Montebello, Quebec
May 31 - June 2, 1982

The provisions which probably received the greatest attention from lobbying groups, particularly the women and various associations of handicapped persons, were the equality rights sections. These are three in number. The first of these is s. 15 which provides:

15.1 Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Sub-section (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In addition, the equivalent of an Equal Rights Amendment is set out in s. 28:

Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Finally, there is a provision which is peculiarly Canadian, namely s. 27:

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Although s. 15(1) may seem to be the camel that a committee produces when attempting to design a horse, it is understandable

in the light of the restricted effect given by the Supreme Court of Canada in interpreting the "equality before the law" clause in s. 1(b) of the Canadian Bill of Rights. First, in response to Mr. Justice Ritchie's judgment in the Lavell case, wherein he implied a distinction between the "equality before the law" clause, and unequal treatment "under the law", s. 15(1) includes protection for equality "under the law". Second, to the extent that Ritchie J. also confined the "equality before the law" clause to the Dicey definition of 1885, the legislative draftsmen added the American "equal protection" clause. Third, since in the Bliss case, dealing with unemployment insurance benefits, Mr. Justice Ritchie rejected a contention that distinctions made with respect to pregnant women contravened the "equality" clause, on the ground that the distinctions "involved a definition of the qualifications required for entitlement to benefits", s. 15(1) now also includes a clause providing for "equal benefit of the law".

Furthermore, with respect to s. 15(1), it must be noted that the four "equality" clauses are now to apply "without discrimination and, in particular without discrimination based on a number of specified grounds. If one were to equate the "valid federal purpose" test, which was evolved for the "equality before the law" clause in the Canadian Bill of Rights, to the "minimal scrutiny" test of the United States Supreme Court, one must now

conclude that the listed grounds, at least those other than "age", "mental disability" and "physical disability", must now be considered subject to "strict scrutiny" as being "inherently suspect". Because it is specified in s. 15(1), and because of the overriding nature of s. 28, "sex" must be considered to have joined "race", "national or ethnic origin", "colour", and "religion" as being "inherently suspect", at least with respect to the rights and freedoms set out in the Charter. Since, with respect to age, and mental and physical disability, bona fide qualifications and requirements are more readily evident, these might not be considered to be "inherently suspect", but rather subject to an "intermediate scrutiny" test.

As far as sub-section (2) of s. 15 is concerned, there should be no question in Canada but that "affirmative action programs" do not contravene the equality clauses in sub-section (1). Even though both the Bakke and Weber cases were decided on the basis of the Civil Rights Act of 1964, rather than the Equal Protection Clause of the Fourteenth Amendment, and even though the Bakke case invalidated only strict quotas, and not the plethora of measures which constitute affirmative action, there was enough suspicion in Canada that our courts might find such programs to contravene equality clauses, that the draftsmen decided to be absolutely certain.

Finally, I would suggest that s. 15 will not be applied to "private action", but will rather be restricted to legislative action. It is true that the Equal Protection clause of the American Fourteenth Amendment has had a limited application to private action, but this must be seen in the context of a situation where, at the time when this interpretation was developed, i.e., after 1954, there were no anti-discrimination (Civil Rights) Acts in 15 of the states and very little at the federal level. Even so, the U.S.S.C. only extended "state action" to a few areas such as privately-owned but municipally-managed parks (Evans v. Newton, 382 U.S. 296 (1966)), private restaurants in publicly-owned facilities (Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)), and restrictive covenants, because they could be enforced only through court action (Shelley v. Kraemer, 334 U.S. 1 (1948))). When the Civil Rights Act of 1964 was enacted, to apply to the federal sphere, to override any state Civil Rights Acts which were deficient, and to apply to those states which did not have their own, resort to the Fourteenth Amendment became less crucial. Now private discrimination cases are pursued under the various Civil Rights Acts; the Fourteenth Amendment is resorted to only for cases involving pure state action.

In our own case, I would suggest that s. 15 should not be applied to "private action", for three reasons. First, by s. 32(1) it is expressed that the Charter applies "to the Parliament and Government of Canada." (para. (b)), "in respect of all matters within the authority" of the respective legislative body. This wording was specifically changed from the version proposed as late as 24 April, 1981, which used the words "and to" in place of the words "in respect of". The intent seems clear to restrict the application. Second, s. 15 refers to equality under and before the law, and equal protection and benefit of the law. The intent appears clear to refer only to inequality arising out of any application of the law. Third, every jurisdiction in Canada has an anti-discrimination (Human Rights) statute, and all of these apply to the Crown, i.e., to executive action. Therefore, s. 15 will probably only be applied where a discriminatory act is committed by legislative action, and the jurisdiction concerned does not have an overriding clause in its Human Rights Act, as do Alberta, Quebec and Saskatchewan.

Finally, with respect to s. 15, it has to be noted that pursuant to s. 32(2), it does not have effect until three years after the coming into force of the Charter.

Finally, s. 27 purports to constitutionalize a policy declared by the government of Canada in 1971 to forward the principle of "bilingualism within a multicultural" context. Since, by the nineteenth century, it became evident that the French-speaking inhabitants of Canada could not be assimilated, and because later immigrants (whose descendants now number around 28% of the population) claimed equality of status with the two "founding" peoples, while whatever "founding" status, claimed by those descended from French and British immigrants, was later than that of the native peoples, the official government policy has been to protect the ethnic plurality of the country. It has been described as a "cultural mosaic", in contrast to the American "melting pot". Even though Canada's "mosaic" may be rather "vertical", to the advantage of those of British stock, nevertheless, s. 27 of the new Charter now gives constitutional status to what was merely proclaimed government policy. It could play a role in interpretation of s. 15, to the extent that ethnocultural groups can show disadvantage. It can certainly form the basis of claims for government funding of culturally-related programs.

1982 CASHRA ANNUAL CONFERENCE



The Charter of Rights:
Its Impact on Human Rights Commissions

by

James MacPherson
Co-ordinator of Constitutional Law
Department of the Attorney General
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Montebello, Québec
May 31 - June 2, 1982

THE CHARTER OF RIGHTS: ITS IMPACT
ON HUMAN RIGHTS COMMISSIONS

INTRODUCTION

It is a pleasant, but worrying, experience to be invited to speak to an audience composed entirely of specialists in human rights matters. I have delivered a number of speeches recently about the new Charter. But the audiences have always contained a mixture of people, ranging from people who can tell you about the most recent human rights developments in Belize or Andorra to people who think that a Charter is something you take to see an Oilers game in Edmonton. So it is pleasant today to speak to an audience composed of people with shared interests and abilities in the area of human rights. But it is worrying that those shared abilities are at such a high level.

"The constitutional litigation of any era" wrote Professor Archibald Cox, "reflects the aspirations and divisions of the contemporary society." Historically, that statement has probably not been valid in a Canadian context. Constitutional litigation in Canada has largely centered on issues of federalism. Those issues, although important, do not generally speak to the hearts and minds of the Canadian people. The hearts and minds of the people are implicated when their fundamental and shared values - liberty, equality, participation in the democratic process (lower mortgage rates!) - become the subjects of discussion. These values have always been the subjects of both politics and litigation in Canada. But they have not generally been matters for constitutional litigation because

they found virtually no expression in any of our constitutional documents. But the Constitution Act, 1982 changes this; it constitutionalizes the fundamental values shared by all Canadians. The values will continue to be discussed and honoured in the political arena. They will also continue to be considered in a litigation context. But the litigation context has a new dimension - constitutional litigation, the most important and visible dimension possible.

In this speech I want to deal with three matters:

- (1) very briefly, the response of provincial governments to the new Charter;
- (2) in more detail, the implications of the Charter for human rights regimes, including Codes, Commissions and Boards of Inquiry;
- (3) very briefly, some general thoughts about the future implications of the Charter for Canadian governments.

I. RESPONSE OF PROVINCIAL GOVERNMENTS TO THE CHARTER

The provincial governments have had to formulate a response to the Charter in three different forums since the First Ministers appeared on television to announce their agreement at midday on November 5, 1981. Those three forums have been: the afternoon and evening of November 5, federal-provincial meetings since November 5, internal provincial study of the effects of the Charter on provincial governments.

(1) Afternoon and Evening of November 5, 1981

For several hours after the First Ministers reached their agreement officials from the governments met in a drafting session in an attempt to convert the intentions of the politicians into constitutional language. One late drafting change had special significance for statutory human rights agencies. The penultimate draft of section 32 of the Charter, dealing with the application of the Charter, had provided:

32.(1) This Charter applies

- (a) to the Parliament and government of Canada and to all matters within the authority of Parliament.....,
- (b) to the legislature and government of each province and to all matters within the authority of the legislature of each province.

This draft of section 32 was ambiguous. The words 'and to' made it arguable that the Charter applied not only to governments (the traditional scope of constitutional bills of rights) but also to private conduct (the traditional jurisdiction of statutory human rights agencies). All the governments clearly intended that the Charter apply only to governments. Accordingly, on November 5, section 32 was amended by deleting the words 'and to' and replacing them with 'in respect of'.

There are still some who would argue that the Charter applies to private conduct as well as to governments. One line of argument is

that some sections of the Charter are obviously directed at the courts (for example a person's right under section 11(b) to be tried within a reasonable time). Since courts are not part of the government, the argument runs, the Charter is not limited in its application to governments. A more promising line of argument is that section 32 is just a typical Crown liability section. It provides that the Crown is bound, but does not deny the application of the Charter in other contexts, including private conduct. Just as section 43 of The Saskatchewan Human Rights Code which provides "This Act binds the Crown" clearly does not deny the application of the Code to private conduct so section 32 of the Charter, which applies to the federal and provincial Crowns, does not deny the application of the Charter to private conduct.

Although arguments such as the two above have some force, the better view, I am almost certain, is that the Charter applies only to governments, not to private individuals. That was the clear intention of all the governments who agreed to the Charter. That is also the fairest way to read the actual words of section 32. Finally, that is also the traditional coverage of constitutional documents. If I am correct in this conclusion, then the implication for statutory human rights regimes is significant. The implication is this: the Charter has no effect on the raison d'etre for human rights Codes and Commissions. Their primary area of operation, namely the relationships between individuals, is maintained.

(2) Federal-Provincial Forum

Federal and provincial officials have been meeting in the last few months to discuss the effects of the Charter on the criminal justice system. Police and prosecutorial conduct has been the focus of the discussions. Since the discussions have no bearing on statutory human rights agencies I will not say anything about them.

(3) Provincial Forum

Most provinces, including Saskatchewan, have been engaged in a comprehensive review of their laws to determine whether they comply with the Charter. In Saskatchewan we have found 300-400 provisions which raise Charter issues. It will come as no surprise to people involved in the human rights field to hear that the greatest volume of Charter issues is posed by legislative differentiations on the basis of sex and age. (Some examples re sex: The Homesteads Act requires a wife to sign a legal instrument affecting a homestead; The Deserted Wives' and Children's Maintenance Act; The Pregnant Mare's Urine Act! Some examples re age: pension schemes, movie attendance, driving and liquor provisions, provisions re capacity to contract, engage in commercial activities, make a will.)

An obvious point needs to be made. There are 300-400 Charter issues in Saskatchewan. There are not 300-400 Charter violations. A great many (indeed probably almost all) of the provisions that we are considering will be saved by section 1 of the Charter which allows

governments to impose 'reasonable limitations' on the rights protected in the Charter.

II. IMPACT OF CHARTER ON HUMAN RIGHTS CODES, COMMISSIONS AND BOARDS OF INQUIRY

I want to start with a general point. The Charter will certainly have an important impact on statutory human rights regimes. But, of perhaps equal importance, statutory human rights regimes may have a major impact on the Charter. I propose to discuss both sides of the impact coin.

A. Impact of Charter on Statutory Human Rights Regimes

I want to make three points with respect to the impact of the Charter on statutory human rights regimes.

First, the Charter will undoubtedly raise the profile of human rights issues generally. This should affect the role of human rights Commissions which are identifiable actors in the human rights arena. Although the provisions in the Charter do not increase the jurisdiction of Commissions, I expect that the mere existence of the Charter will increase public awareness of human rights issues and that this in turn will have a spillover effect on the visibility and workload of Commissions.

Secondly, the Charter gives people a new avenue of recourse for the violation of their human rights. For years now they have

been able to turn to statutory human rights regimes. Now they can turn as well to the courts. But they can only invoke the Charter and turn to the courts if they are alleging that the government - not another individual - is violating their rights. Accordingly, if the Charter applies to government conduct (or 'state action' as it is called in the United States) and human rights Codes apply to private conduct the important question is: what is government conduct?

A partial answer to this question is easy. The Charter certainly applies to legislation in all its forms, i.e. laws, regulations and other statutory instruments, orders-in-council. The Charter also applies to the conduct of government officials. It also applies to the myriad of statutory bodies created by government (for example, labour boards, workers compensation boards, environmental protection agencies) to carry out government policy.

But beyond these certain applications, doubt starts to arise. Let me raise three examples. First, does the Charter apply to Crown corporations? Actually, this is an easy one. Although Crown corporations are created by governments to compete in the private marketplace, there is a great deal of Canadian case law supporting the conclusion that Crown corporations are extensions of governments and arms of government policy. The Charter will apply to Crown corporations.

But what about municipal governments and school boards? Are they part of provincial governments within the meaning of section

32 of the Charter? The recent decision of the Supreme Court of Canada in Blaikie v. Attorney General (Quebec) might suggest a negative answer. In that case the Court held that section 133 of the B.N.A. Act, which provides that the Acts of the legislature of Quebec shall be printed and published in English and French, applied to regulations enacted by the Quebec Government because the Government was closely connected, in a constitutional sense, to the legislature. But the Court went on to hold that section 133 did not compel municipal and school bodies to publish their by-laws in both languages. The link between these bodies and the legislature was too tenuous. By analogy, it might be argued that the link between municipal governments and school boards and "the legislature and government" of the province is also too tenuous. Accordingly, section 32 of the Charter would not apply. Municipalities and school boards would be subject only to provincial human rights Codes. My view, however, is that Blaikie would not be controlling. Municipalities and school boards are important legislatively authorized instruments of government policy. They are close enough to government to be covered by section 32 of the Charter.

Finally, moving even further down the spectrum, what about universities? In appearance, most Canadian universities are engaged in private activity. They are left free by governments to create and implement their own programs. On the other hand, universities are created by statute and they receive substantial funding from both levels of government. Would these links be sufficient to establish universities as institutions involved in 'government conduct'? I think that this is likely a very close case, although personally I

would be inclined to give an affirmative answer.

As the above examples illustrate it will not be easy to divide government conduct and private activity. Yet such a division is important for statutory human rights regimes. Although statutory human rights Codes generally apply to the Crown as well as to individuals, the existence of a second track of legal recourse - the Charter - for alleged violations of human rights by governments may reduce some aspects of the normal caseload of human rights Commissions and boards of inquiry.

The third possible impact of the Charter on statutory human rights regimes relates to the substantive equality or non-discrimination provisions of some of the Codes. Will some of those provisions have to be amended because of section 15 of the Charter?

Section 15 of the Charter provides:

15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 differs from human rights Codes in four respects. First, section 15 includes a ground - mental disability - not found in any Code. Secondly, section 15 contains no words narrowing the definitions of its protected categories. Some Codes, on the other hand, cover the same grounds but define them more narrowly (for example, many Codes define age as between 18 and 65). Thirdly, section 15 excludes some grounds - for example, sexual orientation - found in some Codes.

Fourthly, section 15 is "open-ended"; it is drafted to indicate that differentiations based on categories other than the named categories may also amount to discrimination. In this respect section 15 is broader than all the Canadian Codes except the British Columbia Code.

The question raised by these differences is this: since all the Codes are laws of Parliament or the provincial legislatures and since the Charter applies to such laws does it not follow that the non-discrimination provisions of the Codes must duplicate section 15 of the Charter?

The general argument against forced duplication is that section 32 clearly creates a dichotomy between the government realm and the private realm. The Charter is to apply in the government realm; ordinary legislation applies in the private realm. Presumably an important reason for the dichotomy is to allow governments to formulate independent responses in the area of private conduct. But this intention will be frustrated if the non-discrimination provisions of human rights Codes must duplicate section 15 of the Charter. If that happens then section 32 of the Charter will in effect reach as far as private conduct, at least with respect to equality rights. Such a backdoor broadening of section 32 would not be welcomed by any of the governments who agreed to the Charter.

The general argument in favour of forced duplication is a

seductively simple one. It is that human rights Codes are laws of Parliament or the provincial legislatures, that section 32 of the Charter indicates that the Charter applies to such laws, that failure of the Codes to measure up to section 15 of the Charter - through either omission or conflict - is therefore a violation of the Charter.

Moving beyond these two conflicting general arguments, an answer to the problem may emerge by returning to the four categories of differences between the non-discrimination provisions of the Charter and some Codes mentioned above.

The first category is the situation where a Code expands on the grounds enumerated in section 15 of the Charter. This presents no difficulty. The Charter is a floor of human rights protections. Section 26 of the Charter makes it clear that the rights listed in the Charter are not to be regarded as exhaustive; rather appropriate authorities can expand on the Charter protection. Accordingly, even if a court should decide that human rights Codes must respond to section 15 of the Charter, a legislature's decision to expand the coverage of section 15 would be a valid response. It would, to use the language of some distribution of powers cases, "supplement" the Charter, not "conflict" with it.

The second category is the situation where a Code lists the same grounds as section 15 of the Charter, but defines those grounds more narrowly than section 15. For example, the words 'sex' and 'age'

are not defined in section 15 or anywhere in the Charter. Yet most Codes limit the definition of those words. For example, in many Codes 'age' means between 18 and 65. For example, in many Codes 'sex' is limited by a 'decency' qualification or a 'personal preference' qualification (a house full of women need not admit the randy male boarder!). Are these narrower definitions violations of section 15?

Once again it is possible to avoid the key question of whether the non-discrimination provisions of human rights Codes must duplicate section 15 of the Charter. Even if *prima facie* duplication is required section 1 of the Charter would probably save most of the narrower definitions in Codes. Section 1 permits governments to impose "reasonable limitations" on the rights in the Charter. I would speculate that the courts would find most of the definitional limitations imposed on the non-discrimination grounds in most Codes to be "reasonable limitations." For example, I would expect the courts to easily find that the 'public decency' and 'personal preference' limitations on the definition of sex mentioned above are reasonable limitations. I am not so sure, however, about the other example cited above, namely defining age as between 18 and 65. In light of some of the language of McIntyre J., speaking for a unanimous Court, in Ontario Human Rights Commission v. Borough of Etobicoke (9 February 1982), it may be that the Court would hold a blanket Code definitional limitation of age to be 'unreasonable' and therefore outside section 1.

The third and fourth categories is the situation where a Code completely omits some of the grounds of section 15 of the Charter. For example, no Code in Canada prohibits discrimination on the basis of mental disability. For example, all Canadian Codes, except the British Columbia Code, list grounds on a closed category basis whereas section 15 of the Charter is clearly open-ended. In this situation there is no way to avoid the key question. The Code excludes grounds; it doesn't include extra grounds. So there is no "supplementary" loophole. And because certain grounds are completely omitted there is also no section 1 loophole. We are now forced to answer the question: must human rights Codes duplicate (at a minimum) the coverage of section 15 of the Charter? Or, to put the question in a specific context, will all Codes have to include mental disability as a protected category and will all Codes have to be open-ended?

One argument in favour of an affirmative answer to these questions has already been mentioned. The argument is that Codes are laws of Parliament or provincial legislatures and therefore must comply with the Charter. The argument continues: legislative omission of a section 15 ground in a Code is not just legislative nonfeasance; rather it is legislative misfeasance in that the government is sending a signal that certain types of discrimination are permissible. By sending such a signal the government is in effect giving its imprimatur to such discrimination.

A second argument in favour of an affirmative answer can also be advanced. Section 15 of the Charter gives every individual the right to the "equal benefit of the law without discrimination."

It can be argued that a law (e.g. a Code) that protects individuals from discrimination on some section 15 grounds (i.e. confers a benefit on those individuals) but omits to protect them from discrimination on other section 15 grounds violates section 15. In this situation, the argument would run, the Code has denied individuals certain benefits and the denial has been based on grounds not permitted by section 15.

One argument against compulsory Code duplication of Charter non-discrimination grounds has already been mentioned. Such forced duplication in effect gives the Charter a huge backdoor entry into the area of private conduct. This was not contemplated by the governments which agreed to the Charter, as the wording of section 32 clearly indicates.

A supporting argument would be that omissions in a Code of section 15 grounds do not amount to government authorization for discrimination on the basis of the omitted grounds. No one would argue that a government's decision not to enact any kind of Code would be a government authorization for discrimination on the basis of all the section 15 grounds. Section 15 of the Charter certainly does not compel Canadian governments to enact human rights Codes. If this is true it should follow that section 15 does not require governments which choose to enact Codes to duplicate all the section 15 grounds. In other words, if section 15 does not stand in the way of a government's decision to provide no Code it should

also not stand in the way of a government's decision to provide a partial Code.

Although both sets of arguments have some force I believe that the better view is that all of the substantive non-discrimination sections in Canadian human rights Codes are safe. They do not violate section 15 of the Charter because section 15 must be read along with section 32 which makes it clear that section 15, and all the Charter, is intended to be applied only to government activity. If section 15 was interpreted to force Code duplication of its grounds then the whole rationale for the Charter - to provide uniform protections for Canadian citizens against their governments but to leave the arena of private conduct untouched - would be undercut.

I would like to make one final point in this part of my paper. Although my legal conclusion is that all Code non-discrimination provisions are valid, I do want to say that I think it highly advisable, as a matter of policy, for governments to go at least as far as section 15 of the Charter in their Codes. Section 15, with its open-ended wording, is a broad and liberal non-discrimination provision. It is worthy of emulation by all governments which, presumably, are reviewing their own human rights legislation now that the Charter is in force.

B. Impact of Commissions and Codes on Interpretation of the Charter

I think that the new Charter might be affected in at least three important respects by existing statutory human rights regimes.

First, existing statutory human rights regimes emphasize the educational function of human rights Commissions. Governments, which now have an obligation to educate the public about the new Charter, can learn much from human rights Commissions about the development and implementation of effective public education programs in the human rights field.

Secondly, Canadian courts have something to learn from human rights boards of inquiry about the proper judicial approach to human rights issues. Canadian courts have been relentlessly positivist and conservative in civil liberties cases. They have failed to consider relevant social data and ignored relevant experiences in other jurisdictions (for example, the case law under the United Nations, European and United States human rights regimes). They have also failed to engage in the value-based and interest-balancing discussion that civil liberties cases require. Boards of inquiry, on the other hand, have avoided some of these failings. In so doing they have pointed Canadian courts to a line of inquiry and discussion in civil liberties cases that could be quite valuable.

Thirdly, Canadian courts have something to learn from human

rights boards of inquiry with respect to the substantive interpretation of some of the key concepts in the Charter. Many of those concepts - for example, the concept of "reasonable limitations" - have been considered by boards of inquiry dealing with similar Code concepts. The jurisprudence that has built up in these cases should be very helpful to Canadian courts in their early Charter cases.

III. GENERAL IMPLICATIONS FOR GOVERNMENTS

The foundations of our political theory and practice have shifted because of the Charter. Historically, the dominant wave of Canadian political theory has been represented by the principle of legislative supremacy. There has been an undertow, however - an undertow called limited government, reflected primarily in the principle of federalism. I would suggest that when you add a Charter of Rights to the principle of federalism the very essence of the Canadian system flows powerfully away from legislative supremacy and toward limited government - government limited along jurisdictional lines by federalism, government limited along policy or merits lines by the Charter. The consequence of this is that all governments will have to become increasingly vigilant with respect to their legislation and practices.

Governments will also have to watch for and guard against three tendencies when faced with Charter-based issues. First, there

might be a tendency for some governments to try to use the Charter to duck important but divisive social issues. Private citizens will probably try to use the Charter to turn increasingly to the courts to resolve these issues. But that does not mean that governments should initiate or encourage this development. Governments are elected by the people to make the hard choices; they should not try to avoid this responsibility.

Secondly, governments must take care that they formulate a coherent response to the Charter, especially in the early days of its operation. It is no good to have a General Jaruzelski-type dealing with one Charter case and a remnant of the Berkeley SDS movement dealing with another Charter case in the next office!

The problem of incoherence does not have just an intragovernmental dimension. The problem will be magnified if governments and other institutions, human rights Commissions for example, send different human rights signals to the public. It will be further magnified if Canadian courts and human rights boards of inquiry take radically different approaches to the human rights legislation for whose interpretation they are responsible.

Thirdly, there might be a tendency for governments to become defensive. I can envisage this scenario. A government has an honest desire to comply with the Charter. In a particular case it believes that it has in fact complied. But the government is challenged anyway. The reflex action might be to defend rather than to evaluate. This defensive ness might be magnified if the citizen's challenge is based on the Charte

rather than on the distribution of powers in the Constitution. It is one thing to say to a provincial government: "You can't do that; only Ottawa can." There is no attribution of government immorality or unreasonableness here. But it is another thing entirely to say to a government: "You can't do that; it is immoral, unreasonable." Governments will have to learn to avoid the temptation to react in an extra-defensive way when faced with a challenge in this latter category.

Ultimately, this is an exciting time for governments and for citizens dealing with governments. A Constitution should always state the most fundamental values shared in a society. Some of our fundamental values - respect for basic civil liberties and human rights - have been unrepresented in our Constitution for 115 years. But now they have been given open and eloquent expression in the Constitution.

But this poses a challenge to governments. Their conduct will be subject to a new dimension of scrutiny, challenge and evaluation. Governments, in a system that has for so long been premised on legislative supremacy, will not find the new regime easy to accept. But accept it they must. The spirit of the new Charter and the expectations of Canadian citizens, not to mention the cloudburst of litigation already being initiated by lawyers in private practice, will quickly compel governments to adjust to the new Charter-based Canadian political and legal system.

DOCUMENT: 840-224/008

1982 CASHRA ANNUAL CONFERENCE



THE CANADIAN CHARTER OF RIGHTS:
LAW PRACTICE REVOLUTIONIZED

Equality Provisions in the Charter:
Their Meaning and Interrelationships
With Federal and Provincial Human Rights Acts
(Extract)

by

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Panel: The Charter of Rights:
Its Impact on Human Rights Commissions

Montebello, Québec
May 31 - June 2, 1982

2. The U.S. Equal Protection Clause, the Canadian Bill of Rights, and the Canadian Charter of Rights and Freedoms

(a) Existing Law: U.S. and Canadian

Before turning to a consideration of the protection provided by the new Charter to the right to equality in the law, it will be useful to consider the equal protection clause in the U.S. constitution and the equality before the law clause in the Canadian Bill of Rights in Canada. The breadth of protection will be measured in terms of three criteria: whether discrimination is prohibited in the formulation, operation and administration of the law, whether irrational treatment as well as discrimination is prohibited, and whether affirmative action is required. Also, the issue of whether the court will accept excuses of overriding concerns as well as of good reasons will be considered.

(i) The U.S. Constitution

The relevant provision is contained in the Fourteenth Amendment, and is as follows:

No state shall...deny to any person within its jurisdiction the equal protection of the laws.

The U.S. provision has been interpreted to prohibit discrimination in the formulation³⁴ and administration³⁵ of the law, but not for the most part in its operation; i.e., de facto discrimination is allowed.³⁶ The

vestigial protection afforded to the right to equally in the operation of the law is set out in the Appendix on U.S. law.

The U.S. clause has been held to prohibit irrational treatment as well as discrimination.³⁷ However, the court's scrutiny of a law alleged to be irrational is much less strict than its scrutiny of a law alleged to be discriminatory, unless the irrational treatment is in regard to a very serious matter such as the right to have children.³⁸

The U.S. clause has not been interpreted to require affirmative action on the part of government, except again in the very vestigial way set out in the Appendix.

In conclusion, U.S. law substantially supports parts A and C of the above conception, but not parts B and D; ie. inequality in the formulation and administration are prohibited, but not inequality in the operation of the law or remedial inequality. Also, U.S. law supports the view that adverse treatment is justifiable if there is a good reason for it or if it serves some legitimate governmental purpose; i.e., if there is an overriding concern. Rex v. Reed, where it was argued that a statutory preference for men over women as administrators of estates was acceptable because "men [are] as a rule more conversant with business affairs" provides an example of the court entertaining a good reason argument.³⁹ Regents of the University of California v. Bakke, on the other hand, in which it was argued that a quota system for admission of Blacks to a medical school was justifiable because it was in the interests of assuring academic diversity and remedying past discrimination, provides an example of the court entertaining overriding concern arguments.⁴⁰

(ii) The Canadian Bill of Rights

The relevant section is s. 1(b):

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely...the right of the individual to equality before the law and the protection of the law;

S. 1(b) has been interpreted by the courts to provide only a truncated protection to the right to equality in the formulation of the law. Drybones, a case that has been distinguished but never overruled, indicates there is some right to equality in the formulation of the law: a law penalizing an Indian for being intoxicated off a reserve was held to contravene the right to equality before the law.⁴¹ Lavell, however, indicates it is only those laws which are first administered by the courts and police which are capable of contravening this right: a law depriving a woman, but not a man, of Indian status upon marrying a non-Indian was acceptable because it was first administered by the Band registrar.⁴² And Bliss adds the additional proviso that it is only those laws distributing penalties rather than benefits that are capable of violating the right to equality before the law: a law limiting the right of pregnant women to unemployment insurance was acceptable because it conferred benefits rather than imposed penalties.⁴³

I am unaware of any case in which a law has been held to contravene the Canadian Bill of Rights on the ground that it violated the right to equality in the administration of the law. Indeed, the reasons for judgment of Fauteux J in the Smythe case indicate the Bill does not

protect this right.⁴⁴ In upholding a provision of the Income Tax Act which gave the Attorney General a discretion whether to proceed by indictment or by way of summary conviction, Fauteux J. said:

Appellant's arguments...fail to recognize that the manner in which a Minister of the Crown exercises a statutory discretionary power conferred upon him for the proper administration of a statute is irrelevant in the consideration of the question whether the statute, in itself, offends the principle of equality before the law...In brief, appellant's submission is potentially destructive of statutory ministerial discretion conferred upon a Minister of the Crown for the administration of the law in Canada and tantamount to a recognition that Parliament has used an oblique method to paralyze the administration of the law.⁴⁵

The Supreme Court has also held that the right to equality before the law does not include the right to equality in the operation of the law. Thus, in the Bliss case one of the reasons for finding the law to be acceptable was that the adverse treatment was not because the plaintiff was a woman but rather because she was pregnant, although the latter characteristic is very much correlated with the former.⁴⁶ In other words, the court held that the right to equality before the law does not preclude de facto discrimination.

However, s. 1(b) has been held to prohibit irrational treatment as well as discrimination,⁴⁷ but I am unaware of any case in which it has been held to require affirmative action.

In conclusion, existing Canadian law supports part A of the above conception to a limited degree, but does not support B, C or D; i.e. it provides a truncated protection to the right to equality in the formulation of the law, but does not protect the right to equality in the operation or administration of the law or to remedial equality. Again, as

with U.S. law, the courts are willing to entertain both good reason arguments and overriding concern arguments as defenses to a charge of violating the right to equality before the law. The relevant facts argument in the Bliss case corresponds to a good reason argument,⁴⁸ and the valid federal objective argument corresponds to an overriding concern argument,⁴⁹ or, in the language of the U.S. Supreme Court, to the legitimate state purpose argument.⁵⁰ However, as this case indicates, there is a tendency on the part of Canadian courts to conclude that if a law is intra vires it is justifiable on the basis that it is necessitated by a legitimate governmental purpose; i.e., to forget about the "necessitated" and to misinterpret the "legitimate" as meaning only "legally legitimate", not also "morally legitimate".⁵¹

(b) The Canadian Charter of Rights and Freedoms

The principle relevant provision is s. 15(1):

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In regard to the right to equality in the formulation of the law, the phrases "equal under the law" and "equal benefit of the law" are intended to protect it. The phrase "equal under the law" is intended to ensure that it is not only the laws first administered by the police and courts which must be non-discriminatory; i.e., to overrule Lavell. Thus the annotation to s. 15 indicates that "The addition of the words 'or under' the law after 'before' would ensure that the right to equality would apply in respect of the substance as well as the administration of the law".⁵² The phrase "equal benefit of the law" is intended to ensure that it is not

only penal laws but also laws conferring benefits which must be nondiscriminatory; i.e., to overrule Bliss. Thus the annotation indicates that "The addition of the words ' and equal benefit' of the law after 'protection' would extend the right to ensure that people enjoy equality of benefits as well as the protection of the law."⁵³

The phrase "equal before the law" is intended by the draftsman to protect the right to equality in the administration of the law, as indicated by the portion of the annotation quoted above relating to "under." However, as argued above, this phrase has not been interpreted by the Canadian courts to provide protection against inequality in the administration of the law. It is worth noting, however, that s. 32, the application section of the Charter, is broad enough to cover inequality in the administration of the law, as it states the Charter applies not only to Parliament and to the legislatures, but also to the "government," a term which would presumably cover any lawful authority administering the laws of Parliament or of the legislatures.

The annotation does not indicate that any phrase is intended to protect the right to equality in the operation of the law. There is a spare phrase, "equal protection," but this is the phrase used in the U.S. Constitution, and it has been held by the U.S. court not to preclude de facto discrimination.

The wording of s. 15 does not unequivocally preclude irrational treatment as well as discrimination. "Equal before ... the law without discrimination ..." could be interpreted as precluding only discrimination, not irrational treatment, although the wording does indicate that

the list of suspect characteristics in s. 15 is not exhaustive in regard to discrimination.

The phrase "equal benefit of the law" might be interpreted to mean not only that the Bliss case was overruled but also that government had certain duties of affirmative action. There are, however, certain problems with this interpretation. First, s. 15(2) says that affirmative action programs are not prohibited by s. 15(1); i.e., it seems to assume that on its own s. 15(1) would preclude rather than require affirmative action on the part of government. Also, s. 36 says federal and provincial governments "are committed to (a) promoting equal opportunities for the well being of Canadians; (b) furthering economic development to reduce disparity in opportunities; and (c) providing essential public services of reasonable quality to Canadians," but it does not say that governments are required to achieve these aims. Lastly, s. 14 of the Charter says that a deaf person who is a party or witness in any proceedings has the right to an interpreter--a section which would be unnecessary if s. 15 included the right to remedial equality.

It is reasonable to assume that s. 15 of the Charter will be interpreted to allow excuses based on overriding concerns as well as good reasons, as have been other equality in the law provisions. Indeed, certain sections of the Charter require the courts to take into account such concerns in deciding equality cases: s. 15(2) allows affirmative action programs, s. 25 requires that the Charter be interpreted so as not to derogate from aboriginal rights, and s. 27 requires that it be interpreted in a manner consistent with the multicultured heritage of

Canadians. Thus, presumably, laws which favor Blacks, set up reserve systems for Indians or promote Acadian culture will not be held to violate s. 15(1).

Also, s. 1, the general delimitation clause, in effect says that whenever there is an overriding concern any of the rights enumerated in the Charter may be infringed; e.g., that the right of a publisher to freedom of speech may be overridden by the concern that children be exposed to obscene comic books, that the right of parents to freedom of religion may be overridden by a concern that their children get adequate medical treatment and also that the right of whites not to be treated irrationally may be overridden by a concern that past discrimination against Blacks be remedied. It is to be hoped, however, that s. 1 will not be used by the courts to weaken the protection provided by s. 15, which, as argued above, already implicitly contains a delimitation clause. Will the effect of s. 1 be that it will not be necessary to establish the existence of a "greatly overriding concern which necessitates the adverse treatment" of a disadvantaged group for discrimination against it to be justifiable (see A(1) above), but rather sufficient to establish a "reasonable limit which can be demonstrably justified in a free and democratic society"? The latter wording does seem weaker than the former.

Also, of course, there is the nefarious s. 33, according to which Parliament or the legislature of a Province may expressly declare in an Act that it or one or its provisions shall operate notwithstanding s. 15. Clearly this section could be invoked by government to deprive individuals of any right they have by virtue of s. 15 to equality in the formulation

or operation of the law. But the interesting question remains of whether s. 33 would be of any avail to government if it were to violate the right to equality in the administration of the law or to remedial equality, assuming s. 15 does protect these rights. In regard to these two kinds of equality, the inequality is not in "an Act or a provision of an Act," but rather respectively in the administration of an Act or by virtue of the failure to pass an Act. Therefore the protection s. 33 provides to government may not be as broad as was presumably intended.

There is one other section than s. 15 on equality, namely s. 28, which reads as follows: "Notwithstanding anything in this Charter, the rights and freedoms in it are guaranteed equally to male and female." This is, however, a provision of questionable usefulness. First, it should be noted that its guarantee pertains only to rights set out in the Charter—not, for example, to employment, which is not a matter covered by the Charter. Second, it is an interpretation section; i.e., it does not add another right to the list of those protected in the Charter, but at most amplifies the meaning of rights contained elsewhere in the Charter. Indeed, on its narrowest interpretation s. 28 simply requires that such phrases as "everyone" and "every citizen" in the Charter be interpreted to cover women as well as men. On this interpretation, in regard to s. 15 it would follow merely that women have the same right to equality in law as men. However, there is a broader interpretation of s. 28, namely, that it requires s. 15 to be so interpreted that if a law relates to one of the rights listed in the Charter; e.g., to freedom of speech, the excuse of an overriding concern is unavailable, and perhaps even the excuse of a good

reason, because these rights are "guaranteed equally to male and female person." It is interesting to note that s. 28 is not subject to s. 33, the "notwithstanding" clause. However, even if the broader of these two interpretations of s. 28 is accepted, this will be of no avail to women if the law is said to operate notwithstanding s. 15, as s. 28 provides no additional rights to s. 15.

In conclusion, the wording of s. 15 is not such as to provide clearly and unequivocally complete legal protection to the moral right to equality in the law. In particular, s. 15 may not protect individuals from de facto discrimination or discrimination in the administration of the law, nor prohibit irrational treatment or require affirmative action. However, the interpretation of a provision in an entrenched Bill of Rights is a large matter, one which involves a consideration of the demands of justice and the cause of human rights that the provision was designed to serve, and it is hoped the judiciary will interpret s. 15 accordingly. In particular, it would be neat if it chose to interpret "equality before the law" as meaning equality in the administration of the law, "equality under the law" as equality in the formulation of the law, "equal protection of the law," as equality in the operation of the law and "equal benefit" as remedial equality.

C. Relationship Between the Charter and the Human Rights Act

A comparison will now be made between the Charter and the Acts in terms of the breadth of protection they give to the rights not to be discriminated against, not to be treated irrationally and to be dealt with affirmatively, and also in terms of the breadth of their application to

individuals and government. The issue of whether Acts coupled with the Charter provide complete protection against discrimination by government will then be considered. Lastly the effect if any the Charter will have on the existence or nature of the Human Rights Acts will be discussed.

(i) Breadth of substantive protection.

The moral right to equality in the law is broader in two respects than the right not to be discriminated against--it includes the right not to be treated irrationally, and a right to affirmative action. It is, however, narrower in that it allows the excuse of an overriding concern as well as that of a good reason.

The legal right to equality in the law set out in the Charter appears, however, not to include the right to be treated rationally or to affirmative action. Also, it may only be discrimination in the formulation of the law, and not also in the operation or administration of the law which is prohibited.

If the right protected by the Charter is not in all respects equivalent to the moral right to equality in the law, it is also true that the right protected by the Human Rights Acts is not in all respects equivalent to the moral right not to be discriminated against. In some respects it is broader--the doctrine of reasonable accommodation appears to require affirmative action. In other respects it is narrower--the Acts for the most part preclude discrimination only in the areas of employment and the provision of goods or services.

(ii) Application

The Acts apply to private individuals and also to government in its administrative capacity. They do not apply to government in its legislative capacity in the strong sense of precluding it from enacting discriminatory laws, or in the even stronger sense of being immune from repeal. However, some of them do apply to it in its legislative capacity in the weaker sense of requiring it to include express provisions in laws if they are to operate notwithstanding their discriminatory nature or effect.

The Charter, on the other hand, applies to government in its legislative capacity in the strong sense of being immune from repeal (except by extraordinary procedures). S. 15 also applies to government in its legislative capacity in the weaker sense that government is precluded from enacting blatantly discriminatory laws unless it includes in such laws an express provision saying they are to operate notwithstanding s. 15. The Charter may or may not similarly preclude government from enacting latently discriminatory laws, depending on whether s. 15 is interpreted to preclude inequality in the operation of the law.

Also, the Charter may or may not apply to government in its administrative capacity, again depending on how s. 15 and s. 32 are interpreted. The breadth of the term "government" has also yet to be established. Does it include, for example, persons involved in programs funded by government? Is one's life, as Rawls suggests, a program, so that the phrase covers welfare recipients? What if the financial benefit from government takes the form of tax exemption rather than subsidy?

(iii) Prohibition of Discrimination by Government

As indicated above, government is precluded by the Acts from discriminating in its administrative capacity, and by the Charter from discriminating in its legislative capacity, subject to the following provisions: it is perhaps allowed to discriminate legislatively in a de facto way, it has available to it the excuse of an overriding concern, and it may invoke s. 33. Therefore there are some good-sized loopholes in the legal protection of the right of individuals not to be discriminated against by government, even if both the Human Rights Acts and the Charter are taken into account.

(iv) Effect of the Charter on the Acts

It is only if s. 15 is interpreted as including the right to remedial equality that government is required to enact human right legislation or precluded from repealing it. The enactment of such legislation involves providing the disadvantaged with something not provided to the non-disadvantaged, and therefore involves affirmative action.

It is only if s. 15 is interpreted as including the right to rational treatment that government will be required to deal in an even handed way between the various disadvantaged groups in human rights legislation; e.g., that the failure to protect the handicapped against discrimination in the provision of goods and services in the Canadian Human Rights Act will be subject to review. This law treats the handicapped less advantageously than it does other disadvantaged groups. However, it does not treat them less advantageously than non-disadvantaged groups and therefore it is plausible to argue that the right violated is not the right against

discrimination but rather that to rational treatment. It should be noted that disadvantaged groups will be able to claim "equal treatment" with other disadvantaged groups even if they are not among those listed in s. 15, as s. 15 makes it clear the list is not intended to be exhaustive, assuming that there is a right to rational treatment.

What if human rights legislation is remiss in some other way in the protection it provides the disadvantaged against discrimination? For example, what of the permission to discriminate in the hiring of domestics contained in most Acts? Clearly if privacy really is an overriding concern which necessitates such an exemption, the equality provision will not be violated. But what if it is not? If government has no duty to protect the disadvantaged against discrimination; i.e., if it is not required to act affirmatively, then its failure to provide adequate protection is immune from review, unless it is not evenhanded as between the various disadvantaged groups, which is not the case in the example at hand.

However, it is possible that human rights legislation may be in need of amendment or reinterpretation in order to provide excuses of overriding concerns such as freedom of speech that have been given constitutional significance by the Charter. For example, s. 12 of the Nova Scotia Act has been interpreted by a Board of Inquiry to prohibit an offensive description of Blacks⁵⁵: is this interpretation consistent with s. 26 of the Charter? Similar questions arise in regard to s. 13 of the Canadian Human Rights Act.

Lastly, what if the Acts are misapplied by Commissions or Boards of Inquiries; i.e., what if they erroneously fail to make findings of discrimination? It has been argued that in such circumstances government will be implicated in discrimination, and therefore will violate s. 15 of the Charter.⁵⁶ However, for this to be the case it would be necessary for s. 15 to apply to government in its administrative capacity, which is a matter of controversy. Moreover, it would be necessary for s. 15 to protect the right to remedial equality. If failure to enact anti-discrimination laws violates only the right to remedial equality, so must surely be the case with failure to apply such laws.*

Certainly it has been held in the United States that government's inaction to prevent discrimination does not violate the equal protection clause.⁵⁷ It is only where private discriminatory conduct requires the cooperation of government to accomplish its purpose that government becomes implicated and the equal protection clause comes into play, as in the case of the enforcement of restrictive covenants.⁵⁸

FOOTNOTES

34. Loving v. Virginia (1967), 338 U.S. 1.
35. Yick Wo v. Hopkins, (1886) 118 U.S. 356.
36. Washington v. Davis (1976), 426 U.S. 29.
37. Gulf, Colo & S.F. Ry v. Ellis (1897), 165 U.S. 150.
38. Baxstrom v. Herald (1966), 383 U.S. 107.
39. (1971), 404 U.S. 71.
40. Supra note 11.
41. S.C. 1960 c.44.
42. [1970] S.C.R. 282.
43. [1974] S.C.R. 1349.
44. Bliss v. Attorney General of Canada [1979] 1 S.C.R. 183.
45. Smythe v. The Queen [1971] S.C.R. 681.
46. Ibid at 685-86
47. Supra note 44 at 190-91, where Ritchie J. adopts the reasoning of Pratte J. in the court below in this regard.
48. Curr v. The Queen, [1972] S.C.R. 889.
49. Supra note 44 at 192.
50. Ibid at 194.
51. Supra note 34.
52. Supra note 44 at 193.
53. Consolidation of Proposed Resolution and Possible Amendments, as Placed Before the Special Joint Committee by the Minister of Justice, January, 1981, together with Explanatory Notes.
54. Ibid.
55. Black United Front of Nova Scotia v. Bramhill, (1981) 2 C.H.R.R. D1249
56. John D. Whyte, The Effect of the Canadian Charter of Rights and Freedoms on Non-Criminal Federal and Provincial Law and Administration, unpublished.
57. The Civil Rights Cases 109 U.S. 3 (1883)
58. Shelly v. Kraemer 334 U.S. 1 (1948)

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DOCUMENT: 840-224/009



1982 CASHRA ANNUAL CONFERENCE

Notes for remarks by

Ken Norman, Chief Commissioner,

Saskatchewan Human Rights Commission

Panel: Role of Statutory Agencies:
Role of Appointed Commissioners

Montebello, Quebec
May 31 - June 2, 1982

Without the security and independence which is provided for in the Quebec and federal Acts, through appointment during good behaviour subject only to a removal process involving the legislative body, there is less than full confidence that human rights commissions will enforce their codes as vigorously against their own governments as against the private sector.

Tarnopolsky, Discrimination and the Law in Canada, 1982,
Richard De Boo at p. 434.

My thesis this afternoon is that to ignore Professor Tarnopolsky's commentary is to jeopardize the very point of legislative action in the field of human rights and fundamental freedoms. Although my argument might well have been put some months or indeed years ago, I submit that it is particularly appropriate to consider it now, in the immediate aftermath of the patriation of our new Constitution with its Charter of Rights and Freedoms. For in the sole preambulatory provision of the Charter, it is stated that Canada is founded upon a recognition of the supremacy of the rule of law. Whatever else the principle of the rule of law might be said to stand for it surely sets its face against the notion that anyone is above the law. It was this great democratic idea which brought down President Nixon a decade ago. And it is this same idea which ought to be foremost in our thoughts as we, in human rights commissions in Canada, consider the matter of our institutional integrity. For if we cannot win and retain public confidence that we will be steadfast in our law enforce-

ment responsibilities whether the respondent is a private employer or landlord or the government itself, then particular human rights commissions, and I fear, by association, all human rights commissions, may well come to be perceived by many as being part of the problem in the struggle for human rights in this country. We surely did not take up our appointments and we surely are not gathered here today at this conference because we wish to be seen to be part of the problem. As individuals, we all want to be part of the solution. My suggestion today is that we begin immediately to get our respective institutional houses in order. Its been some five years now that Canada has had established human rights commissions in all jurisdictions. Yet from the perspective of institutional integrity, our commissions present a bewildering array of structures and reporting linkages, not to mention mandates. I propose to now describe and comment upon some of these differences, in order to provide a basis for further discussion and reflection.

With regard to the crucial matter of tenure of office, only Quebec and federal commissioners have the security of knowing that nothing short of an act of the legislative body itself will see them thrown out of their offices. My colleagues and I in Saskatchewan enjoy the next most secure position. We are appointed for a fixed term of five years. The other

jurisdictions either provide for no term or for a maximum term, in either case commissioners continue in office at the pleasure of the cabinet in their province. Saskatchewan and Prince Edward Island are the only two jurisdictions to provide for staggered terms of office. Elsewhere the 'new broom' of a newly elected government can and does sweep clean an entire commission. Now, whether such activity is for better or for worse in terms of advancing the protection of human rights in any given jurisdiction, is open to debate on the subjective merits of just who was ousted and who was put in their place. But, I suggest to you that, over the long term, such partisan behaviour does nothing but harm to the image of human rights commissions as fearless and independent defenders of protected classes of persons against all comers, including governments.

The next related issue is that of reporting. Other than the Quebec Commission which, like Ombudsmen's Offices, enjoys a direct relationship with the legislative body, all other commissions report to a minister. As to which minister, there is no harmony. Some codes specify the minister. Others do not. In practice the commissions are split exactly down the middle. Five of us report to our respective Minister of Justice or Attorney General. Five report to their Minister of Labour. The explanation for this split is historical. But, I ask you to consider whether it makes any continued sense. As for the actual reporting mechanisms, happily half of us actually end up reporting to the legislative body as our minister must lay

our reports before the house within a specified number of days of receiving the same from us.

The situation of commission staff is that they are public servants, except in Quebec and Saskatchewan. This applies to the executive director in four jurisdictions. But in four others, including Saskatchewan I regret to say, the executive director is an 'at pleasure' appointment of the Lieutenant-Governor in Council. In Quebec and Ottawa, the chief executive officer is the head of the commission and may only be removed by the legislative body. In Prince Edward Island the executive director is employed by the commission. If independence and institutional integrity are worthy objectives to be pursued, then I submit that, at least for smaller commissions where full time commissioners are not needed, the Prince Edward Island relationship is the model to be looked to.

The history of the past decade has demonstrated that the real crucible in which commission decisions have been tested has been in the law enforcement area. Other than in Quebec, we have adopted a board of inquiry process for the hearing and determination of probable cause violations of our codes. This process deserves to be examined at both the front and the back ends. First, lets look at how a board of inquiry is established. With the exception of the federal commission, which is given the responsibility to appoint a board, all other jurisdictions

give this function to the responsible minister. Unhappily most codes leave the minister with a discretion in this matter. What a spot this puts a particular minister in where the named respondent is his very own department of government or an agency responsible to him. And what is the public likely to think of the entire process if the minister declines to appoint an inquiry? More than a few such negative exercises of discretion have taken place in recent years by ministers. Thus, this is far from an academic point. Alberta and Saskatchewan remove the discretion from the minister. The decision to appoint a board of inquiry, once taken by the commission, leaves the minister with a clear duty to appoint. This simple, though crucial, change relieves the minister of any potential embarrassment and underscores most emphatically the underlying premise of the rule of law. The soon-to-be-proclaimed Ontario Human Rights Code will take this course. Because this issue is so vital, I propose to read the new Ontario provision to you, in the hope that it might be taken up as a model:

37. - (1) Where the Commission requests the Minister to appoint a board of inquiry, the Minister shall appoint from the panel one or more persons to form the board of inquiry and the Minister shall communicate the names of the persons forming the board to the parties to the inquiry.

(Emphasis added)

Finally, let me turn your attention to the back end of the inquiry process. Given the existence of an aggrieved complainant asserting a claim of right; and, given a determination by a commission that sufficient cause exists to warrant a full public inquiry into the question as to whether a code has been violated; then, surely it follows that the board of inquiry's decision ought to be dispositive, subject only to formal appeals. Yet, three jurisdictions do not follow this course. Their inquiry opinions at the conclusion of hearings are just that - opinions. They are not binding. This is not a happy state of adjudicatory affairs.

Before bringing my remarks to a close, I will now address the question of the roles of statutory human rights agencies. Here again, we find considerable variety and not just in the language of particular human rights codes. What commissions actually do is at least as important as the language of their parent statutes. From the perspective of administrative law, it is, of course, essential to understand the words of the empowering statute. But, the words alone are not enough. One has to listen for the music. My point is that commissions are not just law enforcement and educational agencies, with varying degrees of regulatory authority, we are actually law makers and we should not be shy about recognizing this reality.

On March 26, 1982, in a public lecture at the Faculty of Law, University of Saskatchewan, Professor H. W. Arthurs

made the point in the following language:

I come now to perhaps the most important case of all: how law is made by the administration. Acknowledging that all official action, in some general way, relates back to an empowering statute, we encounter everywhere examples of administrative lawmaking through regulations, formal decisions, policy statements, informal rulings, routine responses to standard situations, press releases, and even through total inaction. All of these, and other techniques, are used not simply to secure compliance with statutory policies, but to secure compliance at a cost, in a manner, and to a degree which is also determined by the administration. Indeed, given the vagueness with which most statutory policies are expressed, their very content is in effect supplied by the administration.

Permit me to cite three recent examples of a human rights commission not just playing the role of a defender of legislated rights but extending itself into the role of a proponent of change, in the name of human rights. First, on Wednesday, April 7, 1982, the federal commission's annual report was tabled in Parliament. That same day a letter from Gordon Fairweather was sent to all Members of Parliament and Senators. A Canadian Press story quotes that letter as pleading with the parliamentarians to abolish mandatory retirement laws. The letter argues that the present law "... is not fair and it

is contrary to the spirit of human rights legislation".

Is the circulation of such a letter an improper role for an independent human rights agency to assume? I suggest not.

Second, there is the role of the Saskatchewan Human Rights Commission with regard to built environment accessibility. In August of 1979 'physical disability' was added as a new protected head to our code. But this simple legislative amendment did nothing to address the hard reality of barriers facing people with disabilities. My colleagues and I decided that what was needed was nothing less than a province-wide building code to ensure accessibility in all new structures and with regard to major renovation projects. To this end, we convened public hearings in the months that followed. Arising out of those hearings, a consumers' committee was given a mandate by the Commission to draft a standard. This was done and a year later the Commission passed a resolution 'adopting' the standard. We realized that such an 'adoption' did not make the Accessibility Standard into building code law. But, it was a first step. And, then came the International Year of Disabled Persons. On March 11, 1982, I authored a covering letter to my Minister, when our Annual Report was filed. That letter said, in part:

... the International Year of Disabled Persons helped establish a climate of opinion which enabled a good deal of headway to be made on the question of building accessibility standards. The Government's promise of

legislation in the field set a most welcome tone for the concluding days of the International Year. The Commission looks forward to the "Accessibility Standard", which we adopted on August 14, 1980, attaining the force of building code law in the coming months.

I am pleased to be able to advise you that Bill 33, The Uniform Building and Accessibility Standards Act has now been read for the first time in the Legislature. Was our activity in promoting this legislative change inappropriate? I leave this question with you.

Third, there is the vexing relationship between the spirit of human rights legislation and the practices of the insurance industry in this country. If human rights commissions were to concern themselves with only the words and not the music, then they might have decided to treat the subject in the same manner as sex was dealt with by Victorian England. That is to say that it ought not to be considered in public discussion. Happily, a number of commissions have chosen a bolder and more forthright course. Most recently Alberta and Saskatchewan have chosen to engage the industry and the public in a debate on the question. Before long, regulations like the federal and proposed Manitoba ones may see the light of day. Again I leave you with the question as to the propriety of this kind of activity.

Finally, there is the role of scrutineer of existing statutory and regulatory provisions. Both Quebec and Ottawa have the responsibility to analyze laws with a view to determining whether they are in conflict with provisions of human rights legislation. This is surely desirable if compliance with human rights codes is to be achieved in the land. It is perhaps implicit in Alberta, Saskatchewan, and P.E.I. that commissions have such a responsibility, given the presence of paramountcy clauses. I should add that this will soon be the case in Ontario with proclamation of Bill 7. But it strikes me that this role ought to be made explicit in all jurisdictions. With the advent of the Charter of Rights and Freedoms, it is even more crucial that human rights houses be put in order and that conflicting legislation be brought into line with human rights codes. And, who is better suited to perform the initial analysis than the responsible human rights agency?

Allow me to conclude by saying that although I have addressed a number of issues, they have all orbited around a central theme. Objective and fearless administration of human rights codes is best ensured by giving security of tenure to commissioners. It is tenure and nothing less which gives the judges the courage to stand up for the rule of law. In his recent book, Fragile Freedoms: Human Rights and Dissent in Canada, Mr. Justice Berger authors this memorable line:

Judges may not always be wiser than politicians, but they should be able to stand more firmly against angry winds

blowing in the streets.

(At page 262.)

Would it not be a worthy goal for us all to look to our own statutory foundations with a view to seeing a day dawn when someone like Mr. Justice Berger might say the same of human rights commissioners?

DOCUMENT: 840-224/009



CONFERENCE ANNUELLE 1982 DE L'ACOSPDH

Notes en vue

d'une allocution de M. Ken Norman,

Commissaire principal de la

Commission des droits de la personne de la Saskatchewan

Débat: Le rôle des organismes statutaires; le rôle
des commissaires nommés

Montebello (Québec)
du 31 mai au 2 juin 1982

Sans la sécurité et l'indépendance qu'assurent les lois du Québec et du Canada par le truchement de nominations qui demeurent en vigueur durant bonne conduite sous réserve d'un processus de destitution ne pouvant être amorcé que par le corps législatif, on ne peut être tout à fait sûr que les commissions des droits de la personne feraient respecter leurs codes aussi rigoureusement par leurs propres gouvernements que par le secteur privé.

Tarnopolsky, Discrimination and the Law in Canada, 1982,
Richard De Boo, p. 434.

À mon avis, si l'on ne tient pas compte de l'observation du professeur Tarnopolsky, on compromet l'essentiel même de l'action législative dans le domaine des droits de la personne et des libertés fondamentales. Mon point de vue aurait pu être formulé il y a quelques mois ou même quelques années, mais j'estime qu'il convient particulièrement de l'examiner à ce stade-ci, immédiatement après le rapatriement de notre constitution, dont fait partie la Charte des droits et libertés. En effet, dans le préambule même de la Charte, il est déclaré que le Canada est fondé sur la reconnaissance de la primauté du droit. Quelles que soient les autres significations que l'on puisse accorder à ce principe, il est certain qu'il s'oppose à l'idée que quiconque soit au-dessus des lois. C'est ce grand principe démocratique qui a entraîné la démission du président Nixon il y a une dizaine d'années. Et c'est ce même principe qui devrait prévaloir, lorsqu'au sein de nos commissions des droits de la personne au Canada, nous nous

penchons sur la question de notre intégrité institutionnelle. Car si nous ne pouvons susciter et maintenir chez le public la conviction que nous accomplirons avec fermeté notre devoir de faire respecter la loi, que ce soit devant un employeur ou un propriétaire privés ou devant l'État lui-même, beaucoup de gens en viendront à considérer des commissions des droits de la personne en particulier comme faisant partie intégrante du problème qui anime la lutte pour les droits de la personne dans notre pays et, je le crains, y associeront toutes les commissions des droits de la personne. Ce n'est certainement parce que nous voulons être considérés comme faisant partie du problème que nous avons accepté nos nominations et que nous sommes réunis ici aujourd'hui. Au contraire, chacun d'entre nous veut prendre part à la solution. Je vous propose donc que nous commençons immédiatement à mettre de l'ordre dans nos institutions respectives. Il y a maintenant environ cinq ans que chaque administration au Canada à sa commission des droits de la personne. Pourtant, du point de vue de l'intégrité institutionnelle, nos commissions comportent un nombre déconcertant de structures et de liens hiérarchiques, sans parler de la diversité des mandats. Je voudrais maintenant mentionner et commenter certaines de ces différences, afin de poser les bases d'une discussion et d'une réflexion plus approfondies.

Pour ce qui est de l'importante question de la durée du mandat, seuls les commissaires québécois et fédéraux jouissent de la sécurité de savoir qu'ils ne peuvent être démis de leurs fonctions que par un acte du corps législatif. Ce sont nous, mes collègues

et moi-même de la Saskatchewan, qui avons ensuite la position la plus sûre. En effet, nous sommes nommés pour une période fixe de cinq ans. Dans les autres administrations, soit qu'aucune période ne soit fixée, soit qu'il y ait une période maximale, et dans les deux cas, les commissaires détiennent leur poste selon le bon plaisir du Cabinet de leur province. La Saskatchewan et l'Île-du-Prince-Édouard sont les deux seules administrations qui prévoient des mandats d'une durée échelonnée. Ailleurs, l'élection d'un nouveau gouvernement peut entraîner un remaniement complet des effectifs d'une commission. Pour ce qui est de savoir si cette formule est avantageuse ou préjudiciable pour la protection des droits de la personne dans une administration donnée, il faut se livrer à un examen subjectif des mérites respectifs des personnes évincées et de leurs remplaçants. Mais à mon avis, un régime partisan comme celui-là ne peut, à long terme, que nuire à l'image des commissions des droits de la personne en tant que défenseurs déterminés et indépendants de certaines classes de personnes contre tous et chacun, y compris les gouvernements.

Il y a aussi la question connexe des liens hiérarchiques. Sauf pour ce qui est de la commission du Québec qui, comme les bureaux des protecteurs du citoyen, relève directement du corps législatif, toutes les autres commissions relèvent d'un ministre, et il n'y a aucune uniformité quant à savoir de quel ministre il s'agit. Certains codes désignent expressément un ministre, d'autres ne le font pas. Dans la pratique, les commissions sont divisées exactement en deux groupes à ce chapitre. Cinq d'entre elles relèvent du ministre de la Justice ou du Procureur général, et cinq, du ministre du Travail. Des raisons historiques expliquent

ce partage des responsabilités, mais ce que je vous demande, c'est de voir si, à votre avis, cet état de choses se justifie encore aujourd'hui. Pour ce qui est des mécanismes hiérarchiques eux-mêmes, heureusement, la moitié d'entre nous relevons finalement du corps législatif, car notre ministre doit déposer dans un délai précis devant la Chambre le rapport que nous lui soumettons.

Pour sa part, le personnel des commissions fait partie de la fonction publique, sauf au Québec et en Saskatchewan, et ce principe s'applique au directeur administratif dans quatre administrations. Dans quatre autres, y compris à mon grand regret en Saskatchewan, le directeur administratif est nommé "à titre amovible" par le lieutenant-gouverneur en conseil. Au Québec et à Ottawa, l'administrateur en chef dirige la commission et il ne peut être destitué que par le corps législatif. À l'Île-du-Prince-Édouard, le directeur administratif est un employé de la commission. Si l'on considère l'indépendance et l'intégrité institutionnelle comme des objectifs valables, j'estime donc, du moins pour les petites commissions qui n'ont pas besoin de commissaires à plein temps, qu'il faudrait adopter comme modèle hiérarchique celui de l'Île-du-Prince-Édouard.

L'histoire de la dernière décennie a démontré que le domaine dans lequel les décisions des commissions ont vraiment été mises à l'épreuve est celui de l'application de la loi. Sauf au Québec, on a adopté un processus de commission d'enquête pour entendre et juger les causes probables de violation de nos codes. Le début

et la fin de ce processus méritent d'être examinés. Étudions d'abord la façon dont une commission d'enquête est instituée. Sauf pour ce qui est de la commission fédérale, à qui revient l'institution d'une commission d'enquête, toutes les autres administrations attribuent cette fonction au ministre responsable. Malheureusement, la plupart des codes laissent cette question à la discrétion du ministre qui se trouve placé dans une mauvaise position lorsque l'intimé est son propre ministère ou un organisme dont il est responsable. Que pensera alors le public de tout le processus si le ministre refuse d'instituer une commission d'enquête? Au cours des dernières années, il est arrivé plusieurs fois que des ministres se soient prévalus de la discrétion qui leur est laissée d'opposer un tel refus. Il ne s'agit donc pas là d'une question purement théorique. L'Alberta et la Saskatchewan n'accordent pas cette discrétion au ministre. Lorsque la commission décide qu'une commission d'enquête doit être instituée, le ministre n'a plus qu'à s'y conformer. Cette différence, élémentaire mais très importante, évite au ministre tout embarras éventuel et souligne très catégoriquement la prémissse sous-jacente de la prémauté du droit. Le Code des droits de la personne de l'Ontario qui sera proclamé prochainement suivra ce modèle. En raison de l'importance capitale de cette question, laissez-moi vous lire la nouvelle disposition de l'Ontario, en espérant qu'elle pourra servir de modèle:

(Traduction)

37. - (1) Lorsque la Commission demande au Ministre d'instituer une commission d'enquête, le ministre doit choisir parmi le groupe une ou plusieurs personnes qui constituent le comité d'enquête, et il doit communiquer le nom de ces personnes aux parties intéressées à l'enquête.

(Certains mots ne sont mis en relief qu'aux fins de la présente citation.)

Enfin, voyons maintenant l'autre extrémité du processus d'enquête. Si un plaignant s'estimant lésé revendique un droit et si une commission estime que le motif est suffisant pour justifier une enquête publique sur la question de savoir s'il y a eu violation d'un code, la décision prise par la commission d'enquête devrait alors nécessairement être exécutoire, sous réserve seulement d'un processus officiel d'appel. Pourtant, trois administrations ne suivent pas cette ligne de conduite. Les opinions émises par les commissions d'enquête à la suite des audiences ne sont que cela, c'est-à-dire des opinions; elles ne lient personne. Ce n'est pas là une très bonne forme d'arbitrage.

Avant de conclure, je voudrais aborder le rôle des organismes statutaires des droits de la personne. Là encore, la disparité est considérable et ce, non seulement dans le libellé des divers codes de droits de la personne. Les actes effectivement accomplis par les commissions sont tout au moins aussi importants que le libellé de leurs lois constitutives. Du point de vue du droit administratif, il va sans dire qu'il est essentiel de comprendre le libellé de la loi habilitante. Or, tout n'est pas de comprendre le libellé, encore

faut-il en saisir l'esprit. C'est-à-dire que les commissions ne sont pas simplement des organismes chargés de faire appliquer la loi et de sensibiliser le public et disposant à cette fin de pouvoirs réglementaires à des degrés divers, car elles participent vraiment à l'élaboration du droit, et elles ne devraient pas hésiter à reconnaître ce fait.

Le 26 mars 1982, au cours d'une conférence prononcée à la faculté de droit de l'Université de la Saskatchewan, le professeur H. W. Arthurs le soulignait en ces termes:

Et maintenant je voudrais parler du cas peut-être le plus important, la façon dont l'administration crée le droit. En admettant que toute action officielle se reporte d'une façon générale à une loi, nous rencontrons partout des exemples de législation administrative issue de règlements, de jugements officiels, de déclarations de principes, de décisions non officielles, de réactions courantes à des situations normales, de communiqués, et même de l'inaction totale. Toutes ces mesures, ainsi que d'autres techniques, sont utilisées non pas simplement pour assurer le respect des politiques établies par des lois, mais pour en assurer le respect à un coût, d'une façon, et dans une mesure que détermine l'administration. En réalisté, compte tenu de l'imprécision de la plupart des politiques établies par les lois, c'est en fait l'administration qui en établit le contenu.

Permettez-moi de vous donner trois exemples récents où des commissions des droits de la personne ne se sont pas contentées de jouer le rôle de défenseur des droits établis par la loi, mais se sont également faites l'avocat du changement, au nom des droits

de la personne. Premièrement, il s'agit de la Commission fédérale, qui a déposé son rapport annuel au Parlement le mercredi 7 avril 1982. Le même jour, M. Gordon Fairweather faisait parvenir une lettre à tous les députés et sénateurs. Selon un article de la Presse canadienne, cette lettre incitait les parlementaires à abolir les lois imposant la retraite obligatoire. Il y est mentionné que la loi actuelle "... n'est pas juste et est contraire à la législation sur les droits de la personne". Un organisme indépendant des droits de la personne outrepasse-t-il son rôle en diffusant une telle lettre? J'estime que non.

Deuxièmement, la Commission des droits de la personne de la Saskatchewan est intervenue relativement à l'accessibilité des constructions. En août 1979, le "handicap physique" était ajouté aux classes protégées en vertu de notre code. Toutefois, cette simple modification législative n'a rien fait pour atténuer la dure réalité des obstacles auxquels se heurtent les handicapés. Mes collègues et moi-même avons décidé qu'il fallait rien de moins qu'une disposition dans le code du bâtiment de la province en vertu de laquelle toute nouvelle structure et tout grand projet de rénovation devraient prévoir des moyens d'accès. À cette fin, nous avons convoqué des audiences publiques au cours des mois qui ont suivi. À la suite de ces audiences, la Commission a chargé un comité de consommateurs de rédiger une norme, ce qui a été fait et, un an plus tard, la Commission "adoptait" cette norme par voie de résolution. Nous savions fort bien qu'une telle "adoption" n'incluait pas à elle seule la norme d'accessibilité dans le code du bâtiment,

mais c'était une première étape. Ensuite est venue l'Année internationale des handicapés. Le 11 mars 1982, au moment où notre rapport annuel était déposé, j'ai adressé à mon ministre une lettre de présentation dans laquelle je disais, entre autres, ce qui suit:

... l'Année internationale des handicapés a aidé à susciter un climat qui a permis d'accomplir beaucoup de progrès dans la question des normes d'accessibilité des constructions. La promesse que le gouvernement a faite d'adopter des dispositions législatives dans ce domaine a contribué à donner un ton on ne peut plus heureux aux derniers jours de l'Année internationale. La Commission espère que la "norme d'accessibilité" qu'elle a adoptée le 14 août 1980 sera intégrée au code du bâtiment dans les prochains mois.

Je suis heureux de vous annoncer que le projet de loi 33, The Uniform Building and Accessibility Standards Act, a passé l'étape de la première lecture. Avons-nous outrepassé notre rôle en encourageant l'adoption de cette modification législative? Je vous laisse le soin de répondre à cette question.

Troisièmement, les rapports controversés qui existent entre l'esprit de la législation sur les droits de la personne et les usages suivis par l'industrie de l'assurance dans notre pays. Si les commissions des droits de la personne devaient ne se préoccuper que de la lettre et non de l'esprit de la loi, elles auraient peut-être décidé de traiter la question de la même façon que le sexe l'a été à l'époque victorienne en Angleterre, c'est-à-dire comme une question dont il ne fallait pas discuter en public. Heureusement, un certain nombre de commissions ont décidé de suivre une ligne de conduite audacieuse et plus directe. Tout dernièrement, l'Alberta

et la Saskatchewan ont choisi de lancer un débat sur la question avec l'industrie et le public. Avant longtemps, des règlements comme ceux du gouvernement fédéral et ceux que propose le Manitoba verront le jour. Ici encore, je vous laisse le soin de déterminer si ce genre d'activité est justifié.

Enfin, les commissions peuvent être appelées à examiner attentivement les lois et les règlements en vigueur. Québec et Ottawa ont la responsabilité d'analyser les lois afin de déterminer si elles entrent en conflit avec les dispositions de la législation sur les droits de la personne. Une telle mesure est certainement souhaitable si l'on veut que les codes relatifs aux droits de la personne soient respectés dans le pays. Une responsabilité de ce genre incombe peut-être implicitement aux commissions de l'Alberta, de la Saskatchewan et de l'Île-du-Prince-Édouard, compte tenu de l'existence de clauses de prépondérance. Je voudrais ajouter qu'en Ontario, l'adoption du projet de loi 7 concrétisera bientôt une formule analogue. Mais j'estime que ce rôle devrait être assigné explicitement dans tous les administrations. Avec l'adoption de la Charte des droits et libertés, il est encore plus important que l'on mette de l'ordre dans les organismes voués à la protection des droits de la personne, et que l'on fasse concorder les lois contradictoires avec les codes des droits de la personne. Et qui mieux que ces organismes peut effectuer l'analyse initiale?

Pour conclure, j'ajouterai que j'ai abordé un certain nombre de questions, mais qu'elles gravitaient toutes autour d'un thème central. La meilleure façon d'assurer l'application objective

et déterminée des codes relatifs aux droits de la personne est de garantir la sécurité du mandat des commissaires. C'est cette sécurité et rien de moins qui donne aux juges le courage de défendre la primauté du droit. Dans son récent ouvrage intitulé "Fragile Freedoms: Human Rights and Dissent in Canada", le juge Berger écrit cette phrase mémorable:

Les juges n'ont peut-être pas toujours plus de sagesse que les hommes politiques, mais ils devraient pouvoir affronter avec plus de fermeté les tempêtes qui font rage dans la rue.

(Traduction, page 262)

Ne serait-ce pas pour nous tous un objectif valable que de nous pencher sur nos lois fondamentales dans la perspective qu'un jour, quelqu'un comme le juge Berger puisse dire la même chose des commissaires aux droits de la personne?

Last year I had cause to reflect upon the independence required for Ombudsmen to do their job properly; I could do no better than call on Mr. Justice Carleton Clement of the Alberta Supreme Court who had stated to the first international conference of Ombudsmen categorically:

"Independence of the Ombudsman is as fundamental to the proper discharge of his duties as it is to a judge."

Mr. Justice Clement's opinion was based on centuries of judicial experience with both the mechanics and consequences of dependence. The public's confidence in the due administration of justice is based on the belief and reality of judicial independence. I continued the argument for independence of the Ombudsman as follows:

The Ombudsman is an external critic of the executive. The Ombudsman can only be effective and credible if his de jure and de facto independence from the executive are firmly entrenched, preferably by statute. Any dependency impairs the Ombudsman's ability to function properly.

The large majority of complaints about human rights violations are directed against private citizens or corporations. A few are leveled against government officials or organizations. An argument

can be made for some independence of human rights officials from the executive arm of government to ensure the credibility and effectiveness of human rights enforcement against government itself when government agencies are accused of violating rights. I believe, however, that there is a more fundamental reason for seeking independence or at least a greater degree of independence for human rights officials from the executive arm of government.

If we were all agreed that certain forms of discrimination are inappropriate and offensive to a person's dignity we would not need human rights codes or administrations. Following our belief we would naturally desist from acts of discrimination. We cling to the belief/myth that the majority of our citizens abhor improper discrimination and support every person's basic human rights. We have staked our democratic beliefs on that assumption; we conceive of democracy roughly as rule of the majority coupled with respect for everyone's basic rights prescribed by constitution.

Historically speaking, however, democracy is simply the rule of the majority (Aristotle, *Politics*). Majorities can be quite intolerant of dissenters, philosophers and the like, as the first practitioners of the democracy, the Athenians of the Periclean Age, already demonstrated. A modern political observer developed the concept of the "Totalitarian Democracy". All this points to the unpalatable truth that democracy and liberalism are not necessarily identical by definition.

Our western political systems should perhaps more properly be characterized as "liberal-democracies" (H.B. Mayo). Constitutions and rights codes are modern attempts at taming democracy to become a tolerable or tolerant form of self-rule. A modern concept of democracy along these lines is represented by the following quote from Professor William H. Riker, an American political scientist:

"Democracy is self-respect for everybody. Within this simple phrase is all that is and ought to be the democratic ideal. Man's self-respect is an understanding of his dignity. It is the value he sets on his own full development, the condition and result of his self-realization. It is his recognition, with neither pride nor groveling, of his indispensability to society and his insignificance in the universe. Most of all, within the limits society allows, it is a function of his self-direction and self-control, of the choice and living of life he thinks best.

If self-respect is the democratic good, then all things that prevent its attainment are democratic evils. Servility, which is the essence of self-contempt, and the subordination which engenders it are, therefore, the ultimate evils in the democratic scheme. Servility and pride - for pride feeds on the servility of the humble and is naught but servility

expressed in the person who exacts it from others - are the antithesis of democratic self-respect. By them men devalue their persons and disfigure their souls." (Riker, W.H., *Democracy in the United States*, 1965, p.17).

Riker's comments represent the ideal of democracy. Unfortunately as human beings we have not yet developed sufficient social graces to ensure that reality conforms to the ideal. Our system of government emphasizes responsiveness of the governors to the wishes and views of the governed. And when those views and wishes fail to respect the rights and dignity of individuals or minority groups we must make a painful choice between our democratic yearnings and our libertarian values.

I return to my earlier comments that codes of human rights most likely exist because we do not universally practice tolerance. It follows from that concern that the administration of human rights codes may need to be insulated from the daily ebb and flow of popular opinion. Such opinions are reflected by the executive arm of government and the daily application of existing human rights legislation to specific cases needs considerable independence from the executive like the judge needs independence from government to produce justice.

I confess to some discomfort about this apparently anti-democratic or non-democratic conclusion and I hasten to add an important distinction. I think it is important to maintain the distinction between legislating human rights on the one hand and the administration or enforcement of a human rights code on the other. The former, legislating human rights, must always remain part of the democratic political process. I would therefore not support the idea that Human Rights Commissions be asked, expected or allowed to legislate new forms of improper discrimination. Such a view does not preclude the role of promotor, proponent or initiator of new rights by a Commission. It only emphasizes that the conclusive word must remain with our elected representatives, government and political parties who represent the will of the people. Once, however, such a consensus or at least majority opinion brings about a new right the enjoyment of that right in individual cases should no longer be revocable at the whim of a majority.

I would like to close with a few more practical comments about the structure of human rights administration: how the need for independence in the practical application of codes can be met and perhaps a few thoughts about the limits of independence.

Interdependence rather than independence characterizes most personal and institutional social relationships. When we discuss the independence of judges, Ombudsmen or human rights administrators we are really talking about degrees of independence. For one thing we are all dependent on someone, government, legislature or taxpayer, providing us with the resources to perform our task.

On the assumption that the creation of human rights codes remains firmly in the democratic political process I would argue that the administration of the code could and should be removed from the political process. Hence human rights administration and enforcement should be or become independent from the government of the day. Total independence from all authority is probably not acceptable and perhaps not even necessary. Ombudsmen and even judges can be removed by Parliament. The obvious model that suggests itself is a Human Rights Commission and administration, created by Parliament (Legislature) and responsible to Parliament (Legislature) along the lines of the Auditor General and Ombudsman. Such a model ensures that Human Rights Commissioners are (1) functionally autonomous, (2) external to the government of the day and (3) operationally independent of both the legislature and the executive.

- 1) "Functionally autonomous" signifies that the Human Rights Commission office is an independent organization in its own right. The staff may be small but the Commission office is not a dependent component of a larger organization (like the Ministry of Labour).
- 2) "external to the government of the day" signifies that the Commission represents the will of the Parliament (Legislature) as a whole not just the majority part of it.
- 3) "operationally independent of both the legislature and the executive", this provision makes the important distinction between, on the one hand, statutory establishment and legislative selection of the Commission and the Commissioners, and on the other hand, the Commission's ability to operate its office without interference from either the legislature or the government. Responsibility of the Commission to the Legislature is maintained through reporting, and the process of appointing and re-appointing Commissioners. Dispositional powers over cases would be in the hands of the Commission who would appoint Boards of Inquiry or refer issues of principle to the Courts. Ministers would no longer play a role in this process, thus eliminating political considerations from the enforcement of existing Human Rights Acts.

The ideal Human Rights Commission would be selected and appointed by the Legislature or Parliament. Commissioners would hold office during good behaviour (like judges) and Commissioners would be suspended or removed only by the Legislature (Parliament). The Commissioners would hold a substantial term of office, anywhere from 5 to 10 years. Parliament will directly consider the staff and budget needs of the office and attend to any issues brought to it by Commission reports.

Obviously these stipulations constitute the outline of the ideal Human Rights Commission and its relationship to political structures. It is a model and can be modified in certain respects. I am personally convinced that any real institution broadly in line with this concept would produce an effective and acceptable human rights regime.

Government
Publications

1982 CASHRA ANNUAL CONFERENCE



Notes For An Address
By
The Honourable Jean Chrétien
Minister of Justice and Attorney General of Canada
To The
1982 Annual Conference of the
Canadian Association of Statutory Human Rights Agencies

Montebello, Québec
May 31 - June 2, 1982

31 MAY 1982

THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS - IMPLICATIONS FOR GOVERNMENTS

I THINK IT IS ONLY APPROPRIATE TO BEGIN MY SPEECH TODAY BY RECALLING THAT THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS WAS NOT DRAFTED IN SOME PROVERBIAL IVORY TOWER, BUT WAS FORGED IN THE CRUCIBLE OF DEMOCRATIC PUBLIC DEBATE AND IT BEARS THE IMPRINT OF A GREAT MANY CANADIANS WHO STROVE TO MAKE IT THE BEST DOCUMENT HUMANLY POSSIBLE. AS PIONEERS IN THE FIELD OF DEVELOPING PROTECTION FOR INDIVIDUALS, INCLUDING PROTECTION AGAINST GOVERNMENTS, THE HUMAN RIGHTS COMMISSIONS IN THIS COUNTRY IN LARGE MEASURE CHARTED THE WAY FOR THE CHARTER. IT WAS THE HUMAN RIGHTS COMMISSIONS WHO TOOK ON GOVERNMENTS UNDER THEIR MANDATES AS PROTECTORS OF INDIVIDUAL RIGHTS TO STRIVE FOR A STRONG CHARTER. THE COMMISSIONS AND THE PEOPLE WHO SERVE THEM PLAYED AN IMPORTANT ROLE IN VIRTUALLY EVERY STAGE OF THE CHARTER'S DEVELOPMENT AND IT IS IN NO SMALL MEASURE DUE TO YOUR CONTRIBUTION THAT CANADA NOW HAS A CHARTER OF RIGHTS AND FREEDOMS THAT SOME LEARNED CRITICS AND COMMENTATORS HAVE DESCRIBED AS ONE OF THE BEST IN THE WORLD.

WHILE THE CHARTER WILL UNDOUBTEDLY AND RIGHTFULLY BE LOOKED UPON AS A FUNDAMENTAL ELEMENT OF OUR CONSTITUTION, THERE ARE THREE BASIC CONSTITUTIONAL CONCEPTS THAT REMAIN AS A VITAL

PART OF OUR CONSTITUTIONAL HERITAGE WHICH CANNOT BE OVERLOOKED IN ANY SERIOUS DISCUSSION OF THE RELATIONSHIP BETWEEN CANADIAN CITIZENS AND THEIR GOVERNMENTS. I AM REFERRING TO THE CONCEPTS OF RESPONSIBLE GOVERNMENT, SOVEREIGNTY OF PARLIAMENT AND THE RULE OF LAW. FOR OVER ONE HUNDRED YEARS THESE THREE INTERTWINED CONCEPTS HAVE EMBODIED THE MOST FUNDAMENTAL PRINCIPLES OF OUR CONSTITUTION. ANYONE WHO FOLLOWED ANY PART OF THE PUBLIC DEBATES ON THE NEED, THE CONTENTS AND THE CONSEQUENCES OF A CHARTER COULD NOT HAVE MISSED REPEATED REFERENCES TO THESE PRINCIPLES BY THOSE ON EVERY SIDE OF THE DEBATE. ALL OF THESE PRINCIPLES ARE RAISED IN THE CONTEXT OF AN ENTRENCHED CHARTER AND IT IS NECESSARY TO ADDRESS HOW EACH IS AFFECTED BY THE CHARTER.

THE CONCEPT OF RESPONSIBLE GOVERNMENT IS ENSHRINED BY THE FACT THAT SECTIONS 3 TO 5 OF THE CHARTER, THE DEMOCRATIC RIGHTS, ARE ENTRENCHED IN THE CONSTITUTION. THESE PROVISIONS PROVIDE FOR THE RIGHT TO VOTE, THE RIGHT TO BE QUALIFIED FOR MEMBERSHIP IN PARLIAMENT OR A LEGISLATIVE ASSEMBLY, AND FOR THE MAXIMUM DURATION AND ANNUAL SITTING OF LEGISLATIVE BODIES. THESE RIGHTS CANNOT BE OVERRIDDEN BY A NOTWITHSTANDING CLAUSE.

THESE RIGHTS, AS MUCH AS ANY OTHERS, ARE INDICATIVE OF THE KINDS OF RIGHTS WE SO MUCH TAKE FOR GRANTED IN THIS COUNTRY THAT THEIR ENTRENCHMENT MAY HARDLY SEEM WORTHY OF MENTION.

PERHAPS THIS IS A TRIBUTE TO THE ENLIGHTENMENT OF OUR TIMES. AND YET, GROUPS OF CANADIANS HAVE BEEN DENIED THE RIGHT TO VOTE ON THE BASIS OF TOTALLY UNJUSTIABLE RACIAL DISCRIMINATION AS RECENTLY AS 1949. EARLIER IN THIS CENTURY OF COURSE WOMEN ALSO COULD NOT VOTE.

TODAY, ISSUES OF A MORE COMPLEX NATURE ARE LIKELY TO ARISE IN CONSIDERING HOW FAR THESE DEMOCRATIC RIGHTS EXTEND. FOR EXAMPLE, THERE ARE LIMITATIONS ON THE EXTENT TO WHICH CIVIL SERVANTS CAN BE INVOLVED IN POLITICAL ACTIVITIES AND ONE THING JUDGES AND PRISONERS HAVE IN COMMON IS THAT THEY CANNOT VOTE. THE VALIDITY OF THESE RESTRICTIONS WILL FALL TO BE DETERMINED ON THE BASIS OF WHETHER THEY COME WITHIN SECTION 1 OF THE CHARTER AS "REASONABLE LIMITS PRESCRIBED BY LAW" THAT "CAN BE DEMONSTRABLY JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY".

THE ENTRENCHMENT OF THE RIGHT TO VOTE, COMBINED WITH EQUALITY RIGHTS, MAY ALSO HAVE IMPLICATIONS FOR THE MANNER IN WHICH ELECTORAL RIDINGS ARE DETERMINED, OR FOR FUTURE PROPOSALS CONCERNING PROPORTIONAL REPRESENTATION, AN ELECTED SENATE OR OTHER PROPOSALS INVOLVING ELECTIONS.

ASIDE FROM THE "DEMOCRATIC RIGHTS" PROVISIONS, THE "FUNDAMENTAL FREEDOMS" SET OUT IN SECTION 2 OF THE CHARTER ARE ALSO IMPORTANT IN STRENGTHENING RESPONSIBLE GOVERNMENT, PARTICULARLY FREEDOM OF EXPRESSION, INCLUDING FREEDOM OF THE PRESS AND OTHER MEDIA OF COMMUNICATION, AND FREEDOM OF ASSOCIATION.

WITH RESPECT TO THE LATTER WE MIGHT RECALL THE BANNING OF POLITICAL PARTIES IN THE PAST. WITH RESPECT TO THE FORMER, WE MIGHT RECALL THAT IN 1938, THE SUPREME COURT OF CANADA RENDERED ITS CLASSIC JUDGMENT IN REFERENCE RE ALBERTA STATUTES RESPECTING POLITICAL EXPRESSION.

IN THAT CASE, THE COURT HELD INVALID PROVINCIAL LEGISLATION IN THE FORM OF AN ACT TO ENSURE THE PUBLICATION OF ACCURATE NEWS AND INFORMATION WHICH WAS DIRECTED AT CURTAILING THE RIGHT OF PUBLIC DISCUSSION. CHIEF JUSTICE DUFF STATED THAT OUR DEMOCRATIC SYSTEM NECESSARILY CONTEMPLATED THE EXISTENCE OF SUCH POLITICAL RIGHTS AS FREEDOM OF PRESS AND SPEECH. HOWEVER, THE CONSTITUTIONAL BASIS FOR GIVING THE RIGHTS THEMSELVES ANY PARAMOUNTY OVER INCONSISTENT PROVINCIAL LEGISLATION WAS NEVER FIRMLY ESTABLISHED ALTHOUGH IN A NUMBER OF SUBSEQUENT CASES SOME JUDGES SOUGHT TO RELY ON WHAT CAME TO BE KNOWN AS THE THEORY OF THE "IMPLIED" BILL OF RIGHTS.

THE CHARTER MAKES CONSTITUTIONALLY CLEAR THAT HENCEFORTH THESE RIGHTS OVERRIDE INCONSISTENT LEGISLATION WHETHER PROVINCIAL OR FEDERAL. HERE AGAIN, AS WITH THE DEMOCRATIC RIGHTS, ISSUES OF A MORE COMPLEX NATURE ARE LIKELY TO ARISE IN THE FUTURE ABOUT HOW FAR THESE RIGHTS EXTEND. FOR EXAMPLE, WE MIGHT SEE A CHALLENGE TO LIMITATIONS ON ELECTION EXPENSES AND

CONTRIBUTIONS, OR ATTEMPTS TO PREVENT UNDUE CONCENTRATION IN THE DAILY NEWSPAPER MARKET. AGAIN THE DECIDING FACTOR WILL LIKELY BE WHETHER SUCH MEASURES CONSTITUTE "REASONABLE LIMITS PRESCRIBED BY LAW AS CAN BE DEMONSTRABLY JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY", A TEST WHICH SEEKS TO PROVIDE A BALANCE BETWEEN VALID COMPETING INTERESTS IN A COMPLEX COMMUNITY.

WHATEVER THE OUTCOME ON ANY OF THE PARTICULAR ISSUES THAT ARE BOUND TO ARISE, RESPONSIBLE GOVERNMENT IS STRENGTHENED BECAUSE THE SPECIFIC DEMOCRATIC RIGHTS AND FUNDAMENTAL FREEDOMS REFERRED TO AND THE "FREE AND DEMOCRATIC SOCIETY" THEY UPHOLD ARE NO LONGER MERELY AN IMPLIED THEORY OF OUR CONSTITUTION. THEY ARE NOW AN EXPRESS AND ESSENTIAL PART OF THE CONSTITUTIONAL TOUCHSTONE AGAINST WHICH WE MEASURE THE VALIDITY OF LEGISLATION AND CLEARLY THEY STRENGTHEN AND PROTECT THE BASIC LAWS AND CONVENTIONS THAT UNDERLIE OUR SYSTEM OF A GOVERNMENT RESPONSIBLE THROUGH PARLIAMENT TO THE ELECTORATE AND TO THE ELECTORATE DIRECTLY THROUGH ELECTIONS.

THE NEXT PRINCIPLE TO BE CONSIDERED IS THE SOVEREIGNTY OR SUPREMACY OF PARLIAMENT.

TO BEGIN WITH, IT IS CLEAR FROM SECTION 32 THAT THE CHARTER APPLIES TO THE PARLIAMENT, LEGISLATIVE ASSEMBLIES AND GOVERNMENTS OF CANADA, THE PROVINCES AND THE TERRITORIES. SECTION 52 OF THE CONSTITUTION ACT, 1982 PROVIDES IN EFFECT THAT ANY LAW INCONSISTENT

WITH THE CHARTER IS, TO THE EXTENT OF THE INCONSISTENCY, OF NO FORCE OR EFFECT. IN ADDITION, SECTION 24 OF THE CHARTER PROVIDES THAT:

"ANYONE WHOSE RIGHTS OR FREEDOMS, AS GUARANTEED BY THIS CHARTER, HAVE BEEN INFRINGED OR DENIED MAY APPLY TO A COURT OF COMPETENT JURISDICTION TO OBTAIN SUCH REMEDY AS THE COURT CONSIDERS APPROPRIATE AND JUST IN THE CIRCUMSTANCES".

I WOULD NOTE IN PASSING THAT THE CHARTER IS NOT INTENDED TO APPLY TO INCONSISTENT ACTIONS BY INDIVIDUALS, AS OPPOSED TO GOVERNMENTS OR LEGISLATURES, AND THIS IMPORTANT DISTINCTION WILL UNDOUBTEDLY BE HIGHLIGHTED IN THE PANEL DISCUSSIONS ON THE IMPACT OF THE CHARTER ON HUMAN RIGHTS COMMISSIONS AND ON SECTION 15 OF THE CHARTER. I THINK THE CHARTER WILL ENHANCE THE ROLE OF HUMAN RIGHTS COMMISSIONS AND YOUR SUBSEQUENT DISCUSSIONS WILL DWELL ON THAT PARTICULAR TOPIC AS WELL. AT THE VERY LEAST, THE ENTRENCHMENT OF SECTION 15 WILL LEND GREATER MORAL IF NOT LEGAL SUPPORT TO THE ROLE OF THE COMMISSIONS IN THE RECOGNITION AND PROTECTION OF THESE RIGHTS.

THE POINT I WISH TO MAKE NOW, HOWEVER, IS THAT THE CHARTER DOES SEVERAL THINGS TO THE RELATIONS BETWEEN GOVERNMENTS AND THE PEOPLE THEY SERVE. IN THE CONTEXT OF THE PRINCIPLE OF THE SOVEREIGNTY OF PARLIAMENT, THE MOST OBVIOUS CHANGE IS THE GREATER ROLE GIVEN TO THE COURTS IN OVERSEEING THAT RELATIONSHIP.

BY VIRTUE OF THE CHARTER, CANADIAN GOVERNMENTS AND LEGISLATURES ARE NOW RESPONSIBLE IN A SUBSTANTIVE WAY NOT ONLY TO THE ELECTORATE BUT TO THE CONSTITUTION. UNTIL NOW, EXCEPT FOR THE CANADIAN BILL OF RIGHTS AND SOME PROVINCIAL EQUIVALENTS, THE CONSTITUTIONAL CONCEPT OF THE SOVEREIGNTY OF PARLIAMENT HAS MEANT THAT AS LONG AS LEGISLATION WAS WITHIN THE JURISDICTION OF THE ENACTING BODY, THE SUBSTANCE OF THAT LEGISLATION WAS NOT SUBJECT TO REVIEW BY THE COURTS. THE ROLE OF THE COURTS IN ENSURING THE INTEGRITY OF THE CONSTITUTION WAS BASICALLY LIMITED TO DECIDING WHETHER THE SUBJECT OF THE LEGISLATION FELL WITHIN FEDERAL OR PROVINCIAL JURISDICTION.

THIS IS NOT TO DENY THAT SOME JUDGES DID IN FACT SEEK TO FIND A BASIS FOR UPHOLDING BASIC RIGHTS IN THE FACE OF RESTRICTIVE LEGISLATION. THE JUDGMENT OF CHIEF JUSTICE DUFF IN THE ALBERTA PRESS CASE HAS ALREADY BEEN REFERRED TO. THE FOLLOWING STATEMENTS BY MR. JUSTICE RAND IN THE WINNER CASE IN 1951, THE SAUMUR CASE IN 1953 AND THE SWITZMAN CASE IN 1957 ARE INDICATIVE OF LATER VIEWS TO SIMILAR EFFECT. IN WINNER, HE SAID:

"THE FIRST AND FUNDAMENTAL ACCOMPLISHMENT OF THE CONSTITUTIONAL ACT WAS THE CREATION OF A SINGLE POLITICAL ORGANIZATION OF SUBJECTS OF HIS MAJESTY WITHIN THE GEOGRAPHICAL AREA OF THE DOMINION, THE BASIC POSTULATE OF WHICH WAS THE INSTITUTION OF A CANADIAN CITIZENSHIP. CITIZENSHIP IS MEMBERSHIP IN A STATE; AND IN THE CITIZEN INHERE THOSE RIGHTS AND DUTIES, THE CORRELATIVES OF ALLEGIANCE AND PROTECTION, WHICH ARE BASIC TO THAT STATUS... .

IT FOLLOWS, A FORTIORI, THAT A PROVINCE CANNOT PREVENT A CANADIAN FROM ENTERING IT EXCEPT, CONCEIVABLY, IN TEMPORARY CIRCUMSTANCES, FOR SOME LOCAL REASON AS, FOR EXAMPLE, HEALTH".

IN THE SAUMUR CASE THE LEARNED JUDGE OBSERVED: "STRICTLY SPEAKING, CIVIL RIGHTS ARISE FROM POSITIVE LAW; BUT FREEDOM OF SPEECH, RELIGION AND THE INVIOABILITY OF THE PERSON, ARE ORIGINAL FREEDOMS WHICH ARE AT ONCE THE NECESSARY ATTRIBUTES AND MODES OF SELF-EXPRESSION OF HUMAN BEINGS AND THE PRIMARY CONDITIONS OF THEIR COMMUNITY LIFE WITHIN A LEGAL ORDER".

FINALLY, IN THE SWITZMAN CASE, JUSTICE RAND ASSERTED: "INDICATED BY THE OPENING WORDS OF THE PREAMBLE IN THE ACT OF 1867, RECITING THE DESIRE OF THE FOUR PROVINCES TO BE UNITED IN A FEDERAL UNION WITH A CONSTITUTION 'SIMILAR IN PRINCIPLE TO THAT OF THE UNITED KINGDOM', THE POLITICAL THEORY WHICH THE ACT EMBODIES IS THAT OF PARLIAMENTARY GOVERNMENT, WITH ALL ITS SOCIAL IMPLICATIONS, AND THE PROVISIONS OF THE STATUTE ELABORATE THAT PRINCIPLE IN THE INSTITUTIONAL APPARATUS WHICH THEY CREATE OR CONTEMPLATE. WHATEVER THE DEFICIENCIES IN ITS WORKINGS, CANADIAN GOVERNMENT IS IN SUBSTANCE THE WILL OF THE MAJORITY EXPRESSED DIRECTLY OR INDIRECTLY THROUGH POPULAR ASSEMBLIES. THIS MEANS ULTIMATELY GOVERNMENT BY THE

FREE PUBLIC OPINION OF AN OPEN SOCIETY...

THIS CONSTITUTIONAL FACT IS THE POLITICAL EXPRESSION OF THE PRIMARY CONDITION OF SOCIAL LIFE, THOUGHT AND ITS COMMUNICATION BY LANGUAGE. LIBERTY IN THIS IS LITTLE LESS VITAL TO MAN'S MIND AND SPIRIT THAN BREATHING IS TO HIS PHYSICAL EXISTENCE. AS SUCH AN INHERENCE IN THE INDIVIDUAL IT IS EMBODIED IN HIS STATUS OF CITIZENSHIP".

DESPITE THESE STATEMENTS, THE CONCEPT OF THE SOVEREIGNTY OF PARLIAMENT PERSEVERED. IN EXERCISING THEIR CONSTITUTIONAL FUNCTION, JUDGES CONSIDERED THAT UNDER OUR CONSTITUTION IT WAS NOT FOR THEM TO JUDGE THE WISDOM, REASONABLENESS OR JUSTNESS OF LEGISLATION AND IF LEGISLATION WAS OTHERWISE VALID, THE FACT IT INFRINGED BASIC RIGHTS WAS NOT A GROUND FOR STRIKING IT DOWN.

TO THE EXTENT THE CHARTER CHANGES THE ROLE OF THE COURTS THIS CHANGE MORE DIRECTLY RELATES TO THE COURTS' RELATIONSHIP TO PARLIAMENT AND THE PROVINCIAL LEGISLATURES THAN TO GOVERNMENTS. BUT IT ALSO AFFECTS GOVERNMENTS - GOVERNMENTS WILL CONTINUE TO BE LOBBIED TO CHANGE UNPOPULAR LAWS AND POLICIES BUT NOW SOME GOVERNMENT ACTIONS, AS WELL AS LEGISLATION, CAN BE CHALLENGED IN COURT AS WELL. THE OBLIGATION SHARED BY GOVERNMENTS, LEGISLATURES AND THE COURTS TO ENSURE WE CONTINUE TO LIVE IN A FREE AND DEMOCRATIC SOCIETY, AS PROVIDED BY THE CHARTER, WILL TO SOME

EXTENT CHANGE THE VENUE AND PROCESS OF SOME OF THE DEBATE ON VARIOUS ISSUES. CANADIANS WILL LOOK NOT ONLY TO ELECTIONS BUT TO JUDICIAL PRONOUNCEMENTS FOR JUDGMENTS ON THE VALIDITY OF GOVERNMENT ACTIONS AND LEGISLATION THAT AFFECT THEIR RIGHTS AND FREEDOMS.

BY VIRTUE OF THE CHARTER, A NEW BALANCE HAS BEEN CREATED BETWEEN THE ROLE OF THE COURTS AND THE POWERS OF GOVERNMENTS AND LEGISLATURES.

ON THE ONE HAND, SECTION 24 OF THE CHARTER IS A RESTRAINT PLACING LIMITS ON ARBITRARY GOVERNMENT AND SECTION 52 IS A CURB ON PARLIAMENTARY SOVEREIGNTY. ON THE OTHER HAND, SECTION 33, WHICH PROVIDES FOR A LEGISLATIVE OVERRIDE THROUGH USE OF A NOTWITHSTANDING CLAUSE, AND THE AMENDING FORMULA, TO A LARGE EXTENT RESTORE THE PREVIOUS BALANCE ASSOCIATED WITH PARLIAMENTARY SOVEREIGNTY.

ONE OF THE FUNCTIONS OF A CONSTITUTION IS TO BALANCE GOVERNMENT POWERS AND INDIVIDUAL RIGHTS THROUGH APPROPRIATE MECHANISMS. SECTION 1 OF THE CHARTER IS INDICATIVE OF THE RECOGNITION THAT NOTHING IS ABSOLUTE. NEITHER INDIVIDUAL RIGHTS NOR ANY GOVERNMENT PHILOSOPHY IS ABSOLUTE. WHAT THE CHARTER PROVIDES IS AN EQUATION THAT SEEKS TO ENSURE A PROPER EQUILIBRIUM THAT WILL PROTECT INDIVIDUAL RIGHTS WHILE CONTINUING TO RECOGNIZE SOCIETY'S LEGITIMATE NEEDS AND THE FREEDOM

OF ACTION TO WHICH GOVERNMENTS AND LEGISLATURES ARE ENTITLED AS DEMOCRATICALLY ELECTED REPRESENTATIVES OF US ALL. THUS, THE CHARTER GIVES THE COURTS A GREATER ROLE AS ARBITER REGARDING FUNDAMENTAL RIGHTS WITHOUT DESTROYING THE ULTIMATE PRINCIPLES OF PARLIAMENTARY SOVEREIGNTY AND RESPONSIBLE GOVERNMENT. THOSE WHO SPEAK ABOUT THE EXTREME INCURSION OF THE CHARTER ON THE SUPREMACY OF PARLIAMENT ARE TALKING ABOUT THE WRONG THING. IT IS IN FACT A CURB ON THE "SUPREMACY OF BUREAUCRACY" SINCE SO MANY OF OUR LAWS ARE IN REGULATIONS - THE "HIDDEN" LAWS WHICH ARE NOT EXPOSED TO THE LIGHT OF DAY AND PUBLIC SCRUTINY AND DEBATE SINCE THEY ARE MADE BY THE GOVERNOR-IN-COUNCIL. I HAVE NOT HEARD ANYONE OBJECT TO CURBING THE BUREAUCRACY TO PROTECT DEMOCRACY. THIS TIES IN AS WELL WITH THE PRINCIPLE THAT OUR SOCIETY IS GOVERNED BY THE RULE OF LAW AS OPPOSED TO THE RULE OF MAN.

IT HAS BEEN SAID THAT THE RULE OR SUPREMACY OF THE LAW, ADMINISTERED BY INDEPENDENT JUDGES, IS THE BASIS OF ALL OUR CONSTITUTIONAL LIBERTIES. THE PURPOSE OF THE RULE OF LAW, VERY BRIEFLY, IS TO PROTECT US FROM THE ARBITRARY INTERFERENCE OF GOVERNMENT, OR OF GOVERNMENT OFFICIALS, IN OUR EVERYDAY LIVES. IT IS A PRINCIPLE RECOGNIZED IN OUR JURISPRUDENCE, IN THE PREAMBLE TO THE CANADIAN BILL OF RIGHTS AND IN THE PREAMBLE TO THE CHARTER. THE CHARTER STRENGTHENS THE RULE OF LAW IN OUR

SOCIETY BY LIMITING ARBITRARY GOVERNMENT AND SENSITIZING THE GOVERNMENT AND PUBLIC TO THE BASIC RIGHTS AND FREEDOMS THAT ARE PARAMOUNT IN OUR DAILY LIVES. THE CHARTER PUTS PEOPLE BEFORE GOVERNMENTS AND ENABLES PERSONS TO BE INDIVIDUALS IN A COMPLEX SOCIETY.

THE GOVERNMENT OF COURSE DOES NOT PASS LEGISLATION. THAT IS THE ROLE OF THE LEGISLATURE. BUT THE FACT IS THAT, PARTICULARLY IN A MAJORITY GOVERNMENT SITUATION, THE GOVERNMENT INITIATES LEGISLATION WHICH IN DUE COURSE BECOMES THE LAW OF THE LAND. IN THE COURSE OF DEFINING ITS POLICIES AND PREPARING AND DRAFTING LEGISLATION, THE GOVERNMENT WILL HAVE TO ASSURE ITSELF THAT NONE OF ITS PROPOSALS ARE INCONSISTENT WITH THE CHARTER.

THIS IS NOT AN ENTIRELY NEW OBLIGATION, AT THE FEDERAL LEVEL IN ANY CASE, SINCE BY SECTION 3 OF THE CANADIAN BILL OF RIGHTS THE FEDERAL MINISTER OF JUSTICE IS RESPONSIBLE FOR ENSURING PROPOSED REGULATIONS AND BILLS ARE CONSISTENT WITH THE CANADIAN BILL OF RIGHTS. AS A LOGICAL CONSEQUENCE OF THE CHARTER, THE MINISTER OF JUSTICE WILL BE PROPOSING LEGISLATION EXPRESSLY STATING THE LEGAL RESPONSIBILITY OF THE MINISTER OF JUSTICE TO ENSURE ALL FEDERAL LEGISLATION COMPLIES WITH THE CHARTER, A PRACTICE WHICH IS ALREADY BEING CARRIED OUT.

THE GOVERNMENT AS A WHOLE SHOULD BE EQUALLY VIGILANT TO ASSURE THE CHARTER IS CONSIDERED WHENEVER POLICIES, PRACTICES, LAWS AND REGULATIONS ARE BEING DEVELOPED OR IMPLEMENTED. HOWEVER, WHILE THIS RESPONSIBILITY PERVERSES THE ENTIRE GOVERNMENT IT IS ONE THAT IS OF PARTICULAR IMPORTANCE TO THE MINISTER OF JUSTICE AS THE LEGAL ADVISER OF THE GOVERNMENT RESPONSIBLE FOR SEEING THAT THE ADMINISTRATION OF PUBLIC AFFAIRS IS IN ACCORDANCE WITH THE LAW. IT MUST ALSO BE REMEMBERED AT THE SAME TIME THAT THE ATTORNEY GENERAL, AS OPPOSED TO THE MINISTER OF JUSTICE, IS RESPONSIBLE FOR ADVISING THE HEADS OF THE SEVERAL DEPARTMENTS OF THE GOVERNMENT UPON ALL MATTERS OF LAW CONNECTED WITH SUCH DEPARTMENTS. THE ATTORNEY GENERAL IS ALSO RESPONSIBLE FOR CONDUCTING ALL LITIGATION IN WHICH THE GOVERNMENT BECOMES INVOLVED. THUS, THERE IS A DUAL RESPONSIBILITY: THAT OF THE MINISTER OF JUSTICE AND THAT OF THE ATTORNEY GENERAL. THE MINISTER OF JUSTICE, WITH RESPONSIBILITIES FOR THE INTEGRITY OF THE FEDERAL LEGAL SYSTEM, HAS TO ENSURE THAT THE CHARTER OF RIGHTS IS COMPLIED WITH AND THAT OTHER PRINCIPLES OF THE ADMINISTRATION OF JUSTICE AND CONSTITUTIONAL LAW ARE RESPECTED. THE ATTORNEY GENERAL MUST ENSURE THAT HIS CLIENT'S INTERESTS AND OBJECTIVES ARE PURSUED WITHIN THE LIMITS OF THE LAW.

THE DEPARTMENT OF JUSTICE MUST THEREFORE BE SENSITIVE TO THE POTENTIALLY CONFLICTING ROLES OF THE MINISTER OF JUSTICE AND THE ATTORNEY GENERAL. AS HAS BEEN POINTED OUT BY A NUMBER OF VIGILANT WOMEN'S RIGHTS GROUPS THIS POTENTIAL CONFLICT HAS BEEN MOST VISIBLE WITH REGARD TO TWO ISSUES OF PARTICULAR CONCERN TO THEM. THE MINISTER OF JUSTICE, WITH RESPONSIBILITY FOR PROMOTING AND DEVELOPING LAWS SUCH AS THE CANADIAN BILL OF RIGHTS AND THE CHARTER, PLAYED AN INSTRUMENTAL ROLE IN ENSURING EXPRESS PROTECTION OF EQUALITY RIGHTS. HOWEVER, AS ATTORNEY GENERAL HE IS SEEN IN THE COURTS, IN CASES SUCH AS THE LAVELL CASE AND THE BLISS CASE, ARGUING AGAINST THE APPLICATION OF EQUALITY RIGHTS IN PARTICULAR SITUATIONS WHICH IS HIS ROLE BECAUSE, LIKE ANY LAWYER, THE ATTORNEY GENERAL IS INSTRUCTED BY HIS CLIENTS. OF COURSE, IT IS ALSO PART OF HIS ROLE TO TRY TO CONVINCE DEPARTMENTS TO AMEND THE LAW OR REGULATIONS IN ISSUE WHERE THEIR POSITION IS DOUBTFUL IN LAW, BUT WHERE A VALID LEGAL ARGUMENT EXISTS, IT IS THE ATTORNEY GENERAL'S ROLE TO FOLLOW HIS CLIENT'S INSTRUCTIONS IF THE CLIENT WISHES THE ARGUMENT TO BE MADE BEFORE THE COURTS.

IN OUR GOVERNMENT, THE MINISTER OF JUSTICE AND THE ATTORNEY GENERAL ARE OF COURSE THE SAME PERSON. THIS HAS BEEN A COMMON PRACTICE IN CANADA AND THE PROVINCES SINCE BEFORE CONFEDERATION. BUT A PERSON WHO HOLDS SUCH DUAL TITLES MUST BE VIGILANT NOT TO CONFUSE THE DIFFERENT RESPONSIBILITIES ATTACHED TO THE DIFFERENT

ROLES THAT HE EMBODIES. THE CHARTER, I THINK, WILL PLACE ADDITIONAL EMPHASIS ON THE TWO ROLES WITHIN THE DEPARTMENT OF JUSTICE BECAUSE OF THE SENSITIVITY, THE COMPLEXITY AND THE NUMBER OF ISSUES THAT WILL ARISE.

THE EXISTENCE OF THE CHARTER WILL UNDOUBTEDLY INCREASE THE WORKLOAD OF THE MINISTER OF JUSTICE AND THE ATTORNEY GENERAL. AT BOTH THE PROVINCIAL AND FEDERAL LEVELS IT WOULD SEEM EVIDENT THAT MEASURES ARE NECESSARY TO ENABLE HIM TO CO-ORDINATE AND PROMOTE THE ONGOING PROPER IMPLEMENTATION OF THE CHARTER AND TO ENSURE THAT THE FUNCTIONS OF GOVERNMENT ARE CARRIED OUT IN ACCORDANCE WITH ITS PROVISIONS.

AT THE FEDERAL LEVEL, AND SIMILAR WORK IS BEING CARRIED OUT, I AM TOLD, AT THE PROVINCIAL LEVEL, THE DEPARTMENT OF JUSTICE IS ASSISTING EVERY GOVERNMENT DEPARTMENT IN A COMPREHENSIVE REVIEW OF LEGISLATION, POLICIES, PRACTICES AND PROGRAMS FOR COMPATIBILITY WITH THE CHARTER. THE DEPARTMENT HAS ESTABLISHED A HUMAN RIGHTS LAW SECTION TO ASSIST ITS LAWYERS LOCATED IN EACH OF THE DIFFERENT DEPARTMENTS WHO WILL BE WORKING DIRECTLY WITH THE DEPARTMENTS IN CONDUCTING THIS REVIEW. ONCE THIS REVIEW IS COMPLETED, IT IS ANTICIPATED THAT AN OMNIBUS BILL CONTAINING NECESSARY ~~AMENDMENTS~~ WILL BE INTRODUCED IN PARLIAMENT. ANOTHER IMPORTANT ASPECT OF THIS EXERCISE IS THAT IT WILL EDUCATE AND SENSITIZE GOVERNMENT OFFICIALS TO THE MANY ASPECTS OF THE CHARTER AND THE IMPORTANCE OF ENSURING THEIR OBSERVANCE.

PERHAPS THE MAIN IMPACT OF THE CHARTER ON GOVERNMENTS WILL BE TO FORCE THEM TO FIND MORE JUST AND SENSITIVE WAYS TO BALANCE THE COMPETING INTERESTS THAT WILL ARISE OUT OF THE RIGHTS CONTAINED IN THE CHARTER. FOR EXAMPLE, FREEDOM OF ASSOCIATION AT ONE AND THE SAME TIME ENCOMPASSES THE CONCEPT OF FORCED ASSOCIATION THROUGH THE CLOSED SHOP AND THE INDIVIDUAL FREEDOM NOT TO ASSOCIATE. THE EXISTENCE OF SUCH COMPETING CLAIMS WITHIN THE CHARTER, OF SOCIETAL CLAIMS VERSUS INDIVIDUAL CLAIMS, IS PERHAPS MOST EVIDENT IN SECTION 15. EVERY DISTINCTION MAY TECHNICALLY CONSTITUTE A DISCRIMINATION. HOWEVER, THERE ARE LEGITIMATE DISTINCTIONS THAT CAN AND MUST BE DRAWN IN A SOCIETY. THE IMPACT OF THE CHARTER WILL BE TO UNDERLINE THE NEED TO DRAW SUCH DISTINCTIONS WITH GREATER CARE THAN IN THE PAST.

I HAVE ONLY PROVIDED A BRIEF CONSIDERATION OF THE IMPLICATIONS OF THE CHARTER ON THE BROAD PRINCIPLES THAT UNDERLIE THE ROLE OF OUR GOVERNMENTS. BUT I THINK IT IS CLEAR THAT THE CHARTER WILL AFFECT GOVERNMENTS IN EVERY ASPECT OF THEIR OPERATIONS WHETHER IN THEIR ROLE AS INITIATORS OF LEGISLATION, EMPLOYERS, ADMINISTRATORS, LAW ENFORCERS, IN SHORT, IN ALL THEIR ACTIVITIES.

BASICALLY, THE ROLE OF A GOVERNMENT IS TO GOVERN BUT TO DO SO JUDICIOUSLY. THE MOST PROMINENT EFFECT OF THE CHARTER MAY BE THAT A NEW CONSCIOUSNESS OF INDIVIDUAL RIGHTS AND FREEDOMS WILL PERVERSE ALL GOVERNMENT ACTIVITY, ADDING TO THE ELEMENT OF JUDICIOUSNESS.

WHILE THIS MIGHT BE AN APPROPRIATE COMMENT WITH WHICH TO CONCLUDE MY REMARKS TODAY, I WOULD LIKE TO ADD THAT THE VALUE OF A CHARTER OF RIGHTS AND FREEDOMS IS FURTHER ELUCIDATED IN THE FOLLOWING QUOTATION WHICH REFLECTS THE VIEW OF THE CANADIAN BAR ASSOCIAION AND WHICH IS DIRECTLY RELEVANT TO THE SUBJECT AT HAND:

"THE SYMBOLIC AND EDUCATIONAL IMPORTANCE OF PROCLAIMING THE RIGHTS OF THE INDIVIDUAL AS BEING BEYOND THE POWER OF A TRANSIENT LEGISLATIVE MAJORITY CAN SCARCELY BE EXAGGERATED. A CLEAR STATEMENT IN THE CONSTITUTION OF THE FUNDAMENTAL VALUES ALL CANADIANS SHARE WOULD, WE THINK, HAVE AN IMPORTANT UNIFYING EFFECT. IT WOULD INculcate IN ALL CITIZENS, YOUNG AND OLD, A CONSCIOUSNESS OF THE IMPORTANCE OF CIVIL LIBERTIES AND AN AUTHORITATIVE EXPRESSION OF THE PARTICULAR RIGHTS AND LIBERTIES OUR SOCIETY CONSIDERS FUNDAMENTAL. TO THE POLITICIAN AND THE PUBLIC SERVANT, IT WOULD PROVIDE AN AUTHORITATIVE STANDARD FOR SCRUTINIZING NOT ONLY STATUTES BUT DELEGATED LEGISLATION.

BEYOND ITS SYMBOLIC AND EDUCATIONAL FUNCTIONS A BILL OF RIGHTS CAN BE AN EFFECTIVE INSTRUMENT OF ENFORCEMENT, PARTICULARLY OF FUNDAMENTAL POLITICAL AND LEGAL RIGHTS. THE COURTS CAN DECLARE LAWS THAT VIOLATE CONSTITUTIONAL RIGHTS INVALID. IN THE ABSENCE OF GUARANTEED RIGHTS, A TRANSIENT MAJORITY IN PARLIAMENT OR A LEGISLATURE CAN DO INCALCULABLE HARM TO A MINORITY OR AN INDIVIDUAL. UNLIKE EXISTING HUMAN RIGHTS LEGISLATION, WHICH CAN ALWAYS BE ABROGATED OR MODIFIED BY STATUTE, IT WOULD CONSTRAIN FUTURE LEGISLATURES AND GOVERNMENTS FROM ACTING IN VIOLATION OF HUMAN RIGHTS. THIS PROTECTION IS ALL THE MORE IMPORTANT IN OUR MODERN ADMINISTRATIVE STATE WHERE THERE IS SUCH A VAST QUANTITY OF DELEGATED LEGISLATION THAT IS NOT SUBJECTED TO THE TYPE OF QUESTIONING INVOLVED IN PARLIAMENTARY DEBATE".

FINALLY, I RECENTLY CAME ACROSS THE FOLLOWING PASSAGE WHICH IS FROM A BOOK ENTITLED "THE CANADIAN POLITICAL SYSTEM" WHICH IS, I BELIEVE, A TEXT THAT HAS BEEN USED BY PROFESSORS FOR QUITE SOME YEARS IN AT LEAST ONE CANADIAN UNIVERSITY. IT READS AS FOLLOWS:

"A CONSTITUTION IS, OR SHOULD BE, A SOURCE OF PRIDE AND A UNIFYING INFLUENCE WITHIN A POLITICAL COMMUNITY. PROFESSOR CHEFFINS HAS DESCRIBED A CONSTITUTION AS "...A MIRROR REFLECTING THE NATIONAL SOUL..." GENERALLY, THIS IS CORRECT, AND CERTAINLY IT APPLIES TO THE CONSTITUTION OF THE U.S. AND TO THE "UNWRITTEN" CONSTITUTION OF THE U.K. IN EACH OF THESE SYSTEMS THE CONSTITUTION, FOR WIDELY DIFFERING REASONS, HAS BECOME A SYMBOL OF THE SOCIETY'S PARTICULAR BRAND OF DEMOCRACY AND AN OBJECT OF NATIONAL PRIDE. CANADA, HOWEVER, MAY OR MAY NOT EVEN HAVE A "NATIONAL SOUL" AND IF WE DO HAVE SUCH A RARE THING, IT IS ARGUABLE WHETHER OUR MUCH-MALIGNED CONSTITUTION CAN BE DUBBED A "MIRROR" THAT REFLECTS IT".

I AM PROUD TO BE ABLE TO SAY, BECAUSE OF THE IMPACT OF THE CHARTER, THAT THIS IS A PASSAGE WHICH, I THINK, THE AUTHORS WILL WANT TO REVISE IN FUTURE EDITIONS OF THEIR WORK.

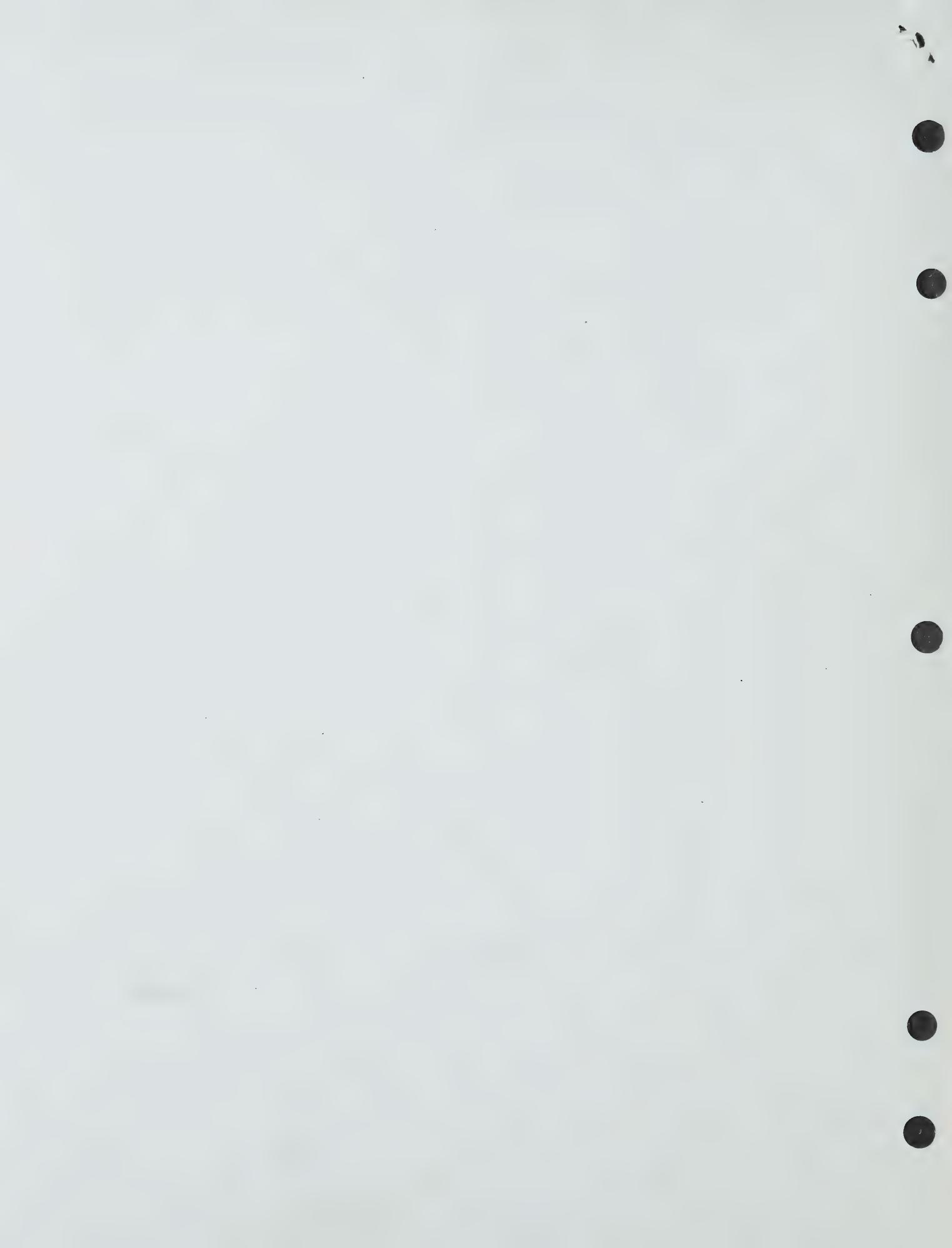
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CONFERENCE ANNUELLE 1982 DE L'ACOSPDH

Notes pour un discours
de
L'honorable Jean Chrétien
Ministre de la Justice et Procureur général du Canada
à la
L'Association Canadienne des Organismes Statutaires
pour la Protection des Droits de l'Homme

Montebello (Québec)
du 31 mai au 2 juin 1982



LE 31 MAI 1982

LA CHARTE CANADIENNE DES DROITS ET LIBERTÉS -
RÉPERCUSSIONS POUR LES GOUVERNEMENTS

JE CROIS QU'IL CONVIENT DE COMMENCER MON DISCOURS D'AUJOURD'HUI EN RAPPELANT QUE LA CHARTE CANADIENNE DES DROITS ET LIBERTÉS N'A PAS ÉTÉ RÉDIGÉE DANS QUELQUE PROVERBIALE TOUR D'IVOIRE, MAIS QU'ELLE A ÉTÉ FAÇONNÉE DANS LE CREUSET D'UN DÉBAT PUBLIC DÉMOCRATIQUE ET QU'ELLE PORTE LA MARQUE D'UN GRAND NOMBRE DE CANADIENS QUI SE SONT EFFORCÉS DE LA RENDRE AUSSI PARFAITE QUE POSSIBLE. À TITRE DE PIONNIERS DANS LE DOMAINE DE LA PROMOTION DE LA PROTECTION DES INDIVIDUS, Y COMPRIS LEUR PROTECTION CONTRE LES GOUVERNEMENTS, LES COMMISSIONS DES DROITS DE LA PERSONNE DU PAYS ONT OUVERT LA VOIE À LA CHARTE. CE SONT ELLES QUI ONT COMMENCÉ À CONTESTER L'ACTION DES GOUVERNEMENTS EN VERTU DE LEUR MANDAT DE PROTECTEUR DES DROITS INDIVIDUELS POUR TENDRE VERS UNE CHARTE DE VALEUR. LES COMMISSIONS ET LES PERSONNES QUI OŒUVRENT AU SEIN DE CELLES-CI ONT JOUÉ UN RÔLE IMPORTANT PRATIQUEMENT À CHAQUE ÉTAPE DE L'ÉLABORATION DE LA CHARTE ET C'EST DANS UNE LARGE MESURE GRÂCE À VOTRE CONTRIBUTION QUE LE CANADA POSSÈDE MAINTENANT UNE CHARTE DES DROITS ET LIBERTÉS RECONNUE PAR DE SAVANTS CRITIQUES ET COMMENTATEURS COMME ÉTANT L'UNE DES MEILLEURES AU MONDE.

BIEN QUE LA CHARTE SERA SANS DOUTE ET À BON DROIT CONSIDÉRÉE COMME FONDEMENT DE NOTRE CONSTITUTION, IL Y A TROIS CONCEPTS CONSTITUTIONNELS DE BASE QUI CONSTITUENT TOUJOURS UNE PARTIE VITALE DE NOTRE HÉRITAGE CONSTITUTIONNEL ET QUE L'ON NE PEUT PAS ÉCARTER DE TOUTE DISCUSSION SÉRIEUSE SUR LES RELATIONS ENTRE LES CITOYENS CANADIENS ET LEURS GOUVERNEMENTS. IL S'AGIT DES CONCEPTS DU GOUVERNEMENT RESPONSABLE, DE LA SOUVERAINETÉ DU PARLEMENT ET DU PRINCIPE DE LA LÉGALITÉ. PENDANT PLUS DE CENT ANS, CES CONCEPTS ÉTROITEMENT LIÉS ONT RENFERMÉ LES PRINCIPES LES PLUS FONDAMENTAUX DE NOTRE CONSTITUTION. QUICONQUE A SUIVI UNE PARTIE DES DÉBATS PUBLICS SUR LA NÉCESSITÉ, LA TENEUR ET LES CONSEQUENCES DE LA CHARTE A SÛREMENT REMARQUÉ LES RENVOIS CONSTANTS À CES PRINCIPES FAITS PAR TOUTES LES PARTIES AU DÉBAT. DANS LE CONTEXTE D'UNE CHARTE ENCHASSEE, TOUS CES PRINCIPES SONT SOULEVÉS ET IL EST NÉCESSAIRE D'EXPOSER LE TRAITEMENT RÉSERVÉ À CHACUN D'EUX.

LE CONCEPT DU GOUVERNEMENT RESPONSABLE EST ENCHASSE DANS LE FAIT QUE LES ARTICLES 3 À 5 DE LA CHARTE TRAITANT DES DROITS DÉMOCRATIQUES SONT ENCHASSÉS DANS LA CONSTITUTION. CES DISPOSITIONS PORTENT SUR LE DROIT DE VOTE, L'ÉLIGIBILITÉ AUX ÉLECTIONS LÉGISLATIVES OU PARLEMENTAIRES, AINSI QUE LE MANDAT MAXIMAL ET LA SÉANCE ANNUELLE DES ASSEMBLÉES LÉGISLATIVES. CES DROITS NE PEUVENT PAS ÊTRE ÉCARTÉS PAR UNE DISPOSITION DÉROGATOIRE.

CES DROITS, COMME D'AUTRES, ILLUSTRENT LES GENRES DE DROITS QUE NOUS TENONS TELLEMENT POUR ACQUIS DANS NOTRE PAYS, QU'IL NE VAUT PAS LA PEINE DE PARLER DE LEUR ENCHASSEMENT DANS UNE CHARTE. PEUT-ÊTRE EST-CE UN SIGNE DE L'ÉVOLUTION QUE CONNAIT NOTRE ÉPOQUE. ET POURTANT, DES GROUPES DE CANADIENS SE SONT VUS REFUSER LE DROIT DE VOTE POUR DES MOTIFS DE DISCRIMINATION RACIALE

TOUT A FAIT INJUSTIFIABLES A UNE ÉPOQUE QUI NE REMONTE QU'À 1949. DE MÊME, AU DÉBUT DU SIECLE, LES FEMMES NE POUVAIENT ÉVIDEMMENT PAS VOTER.

AUJOURD'HUI, IL EST PROBABLE QUE DES QUESTIONS D'UNE NATURE PLUS COMPLEXE SE POSENT SI L'ON CONSIDÈRE L'ÉTENDUE DE CES DROITS DÉMOCRATIQUES. À TITRE D'EXEMPLE, LES FONCTIONNAIRES NE PEUVENT S'ENGAGER SANS CONDITIONS DANS DES ACTIVITÉS POLITIQUES; DE PLUS, LES JUGES ET LES PRISONNIERS ONT UNE CHOSE EN COMMUN: ILS SONT INHABILES À VOTER. LA VALIDITÉ DE CES RESTRICTIONS DEVRA ÊTRE DÉTERMINÉE EN SE FONDANT SUR LA QUESTION DE SAVOIR SI ELLES CONSTITUENT DES "LIMITES QUI SOIENT RAISONNABLES ET DONT LA JUSTIFICATION PUISSE SE DÉMONTRER DANS LE CADRE D'UNE SOCIÉTÉ LIBRE ET DÉMOCRATIQUE", COMME LE PRÉVOIT L'ARTICLE 1 DE LA CHARTE.

L'ENCHASSEMENT DU DROIT DE VOTE, JOINT AUX DROITS À L'ÉGALITÉ, PEUT ÉGALEMENT INFLUER SUR LA MANIÈRE D'ÉTABLIR LES CIRCONSCRIPTIONS ÉLECTORALES, SUR DES PROPOSITIONS FUTURES CONCERNANT LA PRÉSENTATION PROPORTIONNELLE, SUR L'ÉLECTION DES SÉNATEURS OU SUR D'AUTRES PROPOSITIONS SE RAPPORTANT AUX ÉLECTIONS.

OUTRE LES DISPOSITIONS SUR LES "DROITS DÉMOCRATIQUES", LES "LIBERTÉS FONDAMENTALES" ÉNONCÉES À L'ARTICLE 2 DE LA CHARTE SONT AUSSI IMPORTANTES POUR RENFORCER LE CONCEPT DE GOUVERNEMENT RESPONSABLE, SURTOUT LA LIBERTÉ D'EXPRESSION, Y COMPRIS LA LIBERTÉ DE LA PRESSE ET DES AUTRES MOYENS DE COMMUNICATION, ET LA LIBERTÉ D'ASSOCIATION. EN CE QUI CONCERNE CETTE DERNIÈRE, RAPPELONS L'ABOLITION DES PARTIS POLITIQUES DANS LE PASSE. QUANT À LA LIBERTÉ D'EXPRESSION, SOUVENONS-NOUS DE LA DÉCISION DE LA COUR SUPRÈME DU CANADA DANS LE RENVOI RELATIF AUX LOIS DE L'ALBERTA, RESPECTANT LA LIBERTÉ D'EXPRESSION POLITIQUE.

DANS CETTE AFFAIRE, LA COUR A INVALIDÉ UNE LOI PROVINCIALE, AN ACT TO ENSURE THE PUBLICATION OF ACCURATE NEWS AND INFORMATION, QUI VISAIT À RESTREINDRE LE DROIT DE DISCUSSION PUBLIQUE. LE JUGE EN CHEF DUFF A DÉCLARE QUE NOTRE RÉGIME DÉMOCRATIQUE SUPPOSE NÉCESSAIREMENT L'EXISTENCE DE DROITS POLITIQUES COMME LA LIBERTÉ DE PRESSE ET D'EXPRESSION. TOUTEFOIS, IL N'EXISTAIT AUCUN FONDEMENT CONSTITUTIONNEL SOLIDE SUR LEQUEL S'APPUYER POUR DONNER À CES DROITS PRÉSÉANCE SUR UNE LOI PROVINCIALE QUI LES TRANSGRESSERAIT, BIEN QUE DANS DES CAUSES ULTRÉRIEURES, CERTAINS JUGES AIENT CHERCHÉ À INVOQUER CE QU'ON ÉTAIT CONVENU D'APPELER LA THÉORIE DE LA "DECLARATION DES DROITS" IMPLICITE.

AUSSI, LA CHARTE NE LAISSE-T-ELLE PLANER AUCUN DOUTE POUR L'AVENIR EN CE QUI CONCERNE LA PRÉSÉANCE DE CES DROITS SUR TOUTE LOI QUI LEUR EST INCOMPATIBLE, PEU IMPORTE QU'ELLE SOIT PROVINCIALE OU FÉDÉRALE. MAIS COMME DANS LE CAS DES DROITS DÉMOCRATIQUES, IL RISQUE DE SE PRÉSENTER ICI AUSSI DES PROBLÈMES PLUS COMPLEXES OÙ IL FAUDRA DÉTERMINER L'ÉTENDUE DE CES DROITS. PAR EXEMPLE, D'AUCUNS POURRONT REMETTRE EN QUESTION LES RESTRICTIONS EN MATIÈRE DE DÉPENSES OU DE CONTRIBUTIONS ÉLECTORALES OU LES EFFORTS D'EMPÊCHER UNE CONCENTRATION INDUE DE LA NOUVELLE ÉCRITE. IL FAUDRA UNE FOIS DE PLUS SE DEMANDER SI CES MESURES CONSTITUENT "DES LIMITES RAISONNABLES ET DONT LA JUSTIFICATION PUISSE SE DÉMONTRER DANS LE CADRE D'UNE SOCIÉTÉ LIBRE ET DÉMOCRATIQUE". UN EXAMEN QUI CHERCHE À NOUS DOTER D'UN ÉQUILIBRE ENTRE DES INTÉRETS COMPÉTITIFS DANS UN MILIEU COMPLEXE.

QUEL QUE SOIT LE RÉSULTAT DES ÉVÉNEMENTS QUI SE PRÉSENTERONT, LE PRINCIPE DU GOUVERNEMENT RESPONSABLE EST D'AUTANT PLUS RENFORCÉ QUE LES DROITS

DEMOCRATIQUES ET LES LIBERTÉS FONDAMENTALES, AINSI QUE LA "SOCIÉTÉ LIBRE ET DEMOCRATIQUE" QU'ILS SOUS-TENDENT, NE SONT PLUS QU'UNE SIMPLE THÉORIE IMPLICITE DE NOTRE CONSTITUTION, MAIS BIEN UNE PARTIE EXPLICITE ET ESSENTIELLE DE LA PIERRE DE TOUCHE À LAQUELLE SE MESURE LA VALIDITÉ DES LOIS. ILS RENFORCENT ET PROTÈGENT CLAIREMENT LES LOIS ET CONVENTIONS FONDAMENTALES QUI SONT À LA BASE DE NOTRE SYSTÈME DE GOUVERNEMENT LEQUEL EST RESPONSABLE ENVERS L'ÉLECTORAT, D'UNE PART, PAR L'INTERMÉDIAIRE DU PARLEMENT ET, D'AUTRE PART, PAR LE BIAIS DES ÉLECTIONS.

NOUS ARRIVONS, MAINTENANT, AU PRINCIPE DE LA SOUVERAINETÉ OU DE LA SUPRÉMATIE DU PARLEMENT.

SOULIGNONS EN PREMIER LIEU QUE L'ARTICLE 32 DE LA CHARTE S'APPLIQUE TANT AU PARLEMENT FÉDÉRAL ET AUX LEGISLATURES PROVINCIALES QU'AU GOUVERNEMENT DU CANADA, DES PROVINCES ET DES TERRITOIRES. L'ARTICLE 52 DE LA LOI CONSTITUTIONNELLE DE 1982 PRÉVOIT QUE LADITE LOI REND INOPÉRANTES LES DISPOSITIONS DE TOUTE AUTRE RÈGLE DE DROIT QUI LUI SONT INCOMPATIBLES. DE PLUS L'ARTICLE 24 PRÉCISE QUE:

"TOUTE PERSONNE, VICTIME DE VIOLATION OU DE NÉGATION DES DROITS OU LIBERTÉS QUI LUI SONT GARANTIS PAR LA PRÉSENTE CHARTE, PEUT S'ADRESSER À UN TRIBUNAL COMPÉTENT POUR OBTENIR LA RÉPARATION QUE LE TRIBUNAL ESTIME CONVENABLE ET JUSTE EN ÉGARD AUX CIRCONSTANCES."

IL EST À NOTER, EN PASSANT, QUE LA CHARTE NE VISE PAS LES ACTES DÉROGATOIRES DES PARTICULIERS PAR OPPOSITION À CEUX DES GOUVERNEMENTS OU DES LEGISLATURES, ET CETTE DISTINCTION IMPORTANTE SERA SANS DOUTE MISE EN LUMIÈRE DANS LES DISCUSSIONS QUI PORTERONT SUR L'INCIDENCE DE LA CHARTE SUR LES

COMMISSIONS DES DROITS DE LA PERSONNE ET SUR L'ARTICLE 15 DE LADITE CHARTE. JE CROIS QUE LA CHARTE REHAUSERA LE RÔLE DES COMMISSIONS DES DROITS DE LA PERSONNE, ET VOS PROCHAINES DISCUSSIONS PORTERONT ÉGALEMENT SUR CETTE QUESTION. L'ENCHASSEMENT DE L'ARTICLE 15 DANS LA CHARTE DONNERA À TOUT LE MOINS PLUS DE SUPPORT MORAL SINON LÉGAL AU RÔLE DES COMMISSIONS DANS LA RECONNAISSANCE ET LA PROTECTION DE CES DROITS.

CE QUE JE TIENS À DIRE ICI, C'EST QUE LA CHARTE COMPORTE PLUSIEURS DISPOSITIONS QUI TOUCHENT LES RAPPORTS ENTRE LES GOUVERNEMENTS ET LES PERSONNES QU'ILS SERVENT. DANS LE CONTEXTE DU PRINCIPE DE LA SOUVERAINETÉ DU PARLEMENT, LE CHANGEMENT LE PLUS MANIFESTE EST L'ÉLARGISSEMENT DU RÔLE DONNÉ AUX TRIBUNAUX DANS LA SURVEILLANCE DE CES RAPPORTS.

EN VERTU DE LA CHARTE, LES GOUVERNEMENTS FÉDÉRAL ET PROVINCIAUX SONT DÉSORMAIS TRIBUTAIRES NON SEULEMENT DE L'ÉLECTORAT MAIS ÉGALEMENT DE LA CONSTITUTION. auparavant, sauf pour la déclaration canadienne des droits et quelques lois provinciales équivalentes, le concept constitutionnel de la souveraineté du parlement signifiait que la teneur d'une loi ne pouvait être soumise à l'examen des tribunaux que si ladite loi n'entrant pas dans le domaine de compétence du législateur qui l'aurait adoptée. en effet, le rôle des tribunaux en matière de surveillance se limitait essentiellement à décider si l'objet d'une loi était de compétence fédérale ou provinciale.

IL N'EST PAS QUESTION DE NIER QUE CERTAINS JUGES AIENT TENTÉ, EN FAIT, DE TROUVER UN FONDAMENT POUR FAIRE RESPECTER LES DROITS FONDAMENTAUX EN DÉPIT DES LOIS RESTRICTIVES. LA DÉCISION RENDUE PAR LE JUGE EN CHEF DUFF DANS LE RENVOI RELATIF À LA LOI DE L'ALBERTA SUR LA PRESSE A DÉJÀ ÉTÉ MENTIONNÉE.

LES DECLARATIONS QUI SUIVENT, FAITES PAR LE JUGE RAND DANS L'AFFAIRE WINNER EN 1951, L'AFFAIRE SAUMUR EN 1953 ET L'AFFAIRE SWITZMAN EN 1957, ILLUSTRENT BIEN LES OPINIONS SUBSEQUENTES AU MÊME EFFET. DANS L'AFFAIRE WINNER, IL DÉCLARAIT:

"LA PREMIÈRE ET LA PRINCIPALE RÉALISATION DE NOTRE CONSTITUTION A ÉTÉ D'ORGANISER LES SUJETS DE SA MAJESTÉ EN UNE UNITÉ POLITIQUE DANS LES LIMITES GÉOGRAPHIQUES DU DOMINION: LE POSTULAT FONDAMENTAL DE CETTE ORGANISATION A ÉTÉ L'INSTITUTION DE LA CITOYENNETÉ CANADIENNE. LA CITOYENNETÉ SE DÉFINIT COMME L'APPARTENANCE À UN ÉTAT: LES CITOYENS ONT DES DROITS ET DES DEVOIRS, COROLLAIRES DE L'ALLÉGEANCE ET DE LA PROTECTION, QUI SONT LES FONDEMENTS DE CE STATUT..."

A FORTIORI, IL S'ENSUIT QU'UNE PROVINCE NE PEUT EMPÊCHER UN CANADIEN D'ENTRER SUR SON TERRITOIRE SAUF, COMME ON PEUT LE PRÉSUMER, DANS DES CIRCONSTANCES PARTICULIÈRES ET POUR DES MOTIFS D'ORDRE LOCAL COMME, PAR EXEMPLE, DES RAISONS DE SANTE."

DANS L'AFFAIRE SAUMUR CE JUGE ÉRUDIT OBSERVA QUE:

"À PROPREMENT PARLER, LES DROITS CIVILS TIRENT LEUR ORIGINE DU DROIT POSITIF; MAIS LA LIBERTÉ DE PAROLE ET DE RELIGION ET L'INVIOABILITY DE LA PERSONNE SONT DES LIBERTÉS PRIMORDIALES QUI CONSTITUENT LES ATTRIBUTS ESSENTIELS DE L'ÊTRE HUMAIN, SON MODE NÉCESSAIRE

D'EXPRESSION ET LA CONDITION FONDAMENTALE DE SON EXISTENCE AU SEIN D'UNE COLLECTIVITÉ RÉGIE PAR UN SYSTÈME JUDICIAIRE."

ENFIN, DANS UN EXTRAIT DE L'AFFAIRE SWITZMAN LE JUGE RAND AFFIRMA QUE:

"AINSI QUE L'INDIQUENT LES PREMIERS MOTS DU PRÉAMBULE DE L'ACTE DE 1867 QUI EXPOSE LE SOUHAIT DES QUATRE PROVINCES DE CONTRACTER UNE UNION FÉDÉRALE AVEC UNE CONSTITUTION "REPOSANT SUR LES MÊMES PRINCIPES QUE CELLE DU ROYAUME-UNI", LA THÉORIE POLITIQUE QUI Y EST FORMULÉE EST CELLE DU GOUVERNEMENT PARLEMENTAIRE, AVEC TOUTES SES IMPLICATIONS SOCIALES, ET LES DISPOSITIONS DE L'ACTE ÉTABLISSENT CE PRINCIPE DANS L'APPAREIL INSTITUTIONNEL QU'ELLES CRÉENT OU ENVISAGENT. QUELLES QUE SOIENT SES DÉFICIENCES, LE GOUVERNEMENT AU CANADA EST EN FAIT L'ÉMANATION DE LA VOLONTÉ DE LA MAJORITÉ, EXPRIMÉE DIRECTEMENT OU INDIRECTEMENT PAR L'INTERMÉDIAIRE D'ASSEMBLÉES POPULAIRES. CELA CORRESPOND FINALEMENT À UN GOUVERNEMENT PAR LE LIBRE JEU DE L'OPINION PUBLIQUE DANS UNE SOCIÉTÉ LIBRE..."

CE FAIT CONSTITUTIONNEL EST L'EXPRESSION POLITIQUE DE LA CONDITION ESSENTIELLE DE LA VIE SOCIALE, DE LA PENSÉE ET DE SA COMMUNICATION PAR LE LANGAGE. LA LIBERTÉ EN CE DOMAINE EST TOUT AUSSI VITALE À L'ESPRIT HUMAIN QUE L'EST

LA RESPIRATION A L'EXISTENCE PHYSIQUE DE L'INDIVIDU. EN TANT QUE CARACTÈRE PROPRE A L'INDIVIDU, ELLE FAIT PARTIE DE SON STATUT DE CITOYEN."

LE CONCEPT DE LA SOUVERAINETÉ DU PARLEMENT A PERSISTÉ, MALGRÉ CES ASSERTIONS. DANS L'EXERCICE DU RÔLE QUE LEUR ATTRIBUE LA CONSTITUTION, LES JUGES ONT ESTIMÉ QU'IL NE LEUR APPARTENAIT PAS DE JUGER DE LA SAGESSE, DU CARACTÈRE RAISONNABLE OU DE LA JUSTESSE D'UNE LOI, ET QUE, SI CETTE DERNIÈRE ÉTAIT VALIDE A D'AUTRES ÉGARDS, LE FAIT QU'ELLE PORTAIT ATTEINTE A DES DROITS FONDAMENTAUX NE CONSTITUAIT PAS UN MOTIF SUFFISANT POUR L'INVALIDER.

DANS LA MESURE OÙ LA CHARTE MODIFIE LE RÔLE DES TRIBUNAUX, CETTE MODIFICATION A TRAIT PLUS DIRECTEMENT AUX RAPPORTS DES TRIBUNAUX AVEC LE PARLEMENT ET LES LÉGISLATURES PROVINCIALES QU'AVEC LES GOUVERNEMENTS. MAIS CES CHANGEMENTS INTÉRESSENT AUSSI LES GOUVERNEMENTS, - ON CONTINUERA DE FAIRE DES PRESSIONS SUR CES DERNIERS DANS LE BUT DE FAIRE CHANGER DES LOIS ET DES POLITIQUES IMPOPULAIRES, MAIS MAINTENANT CERTAINES ACTIVITÉS DES GOUVERNEMENTS, AINSI QUE LES LOIS, PEUVENT ÊTRE CONTESTÉES DEVANT LES TRIBUNAUX. L'OBLIGATION QU'ONT LES GOUVERNEMENTS, LES LÉGISLATURES ET LES TRIBUNAUX DE S'ASSURER QUE NOUS CONTINUONS DE VIVRE DANS UNE SOCIÉTÉ LIBRE ET DÉMOCRATIQUE, TEL QUE LE PRÉVOIT LA CHARTE, CHANGERÀ, DANS UNE CERTAINE MESURE, L'ORIENTATION D'UNE PARTIE DU DÉBAT SUR DIFFÉRENTES QUESTIONS ET LA MANIÈRE DONT IL SE FERA. LES CANADIENS NE COMPTERONT PAS SEULEMENT SUR LES ÉLECTIONS MAIS AUSSI SUR LES DÉCISIONS JUDICIAIRES POUR JUGER DE LA VALIDITÉ DES ACTIONS ET DES LOIS DES GOUVERNEMENTS QUI INTÉRESSENT LEURS DROITS ET LEURS LIBERTÉS.

LA CHARTE A ÉTABLI UN NOUVEL ÉQUILIBRE ENTRE LE RÔLE DES TRIBUNAUX ET LES POUVOIRS DES GOUVERNEMENTS ET DES ASSEMBLÉES LÉGISLATIVES.

D'UNE PART, L'ARTICLE 24 DE LA CHARTE LIMITE L'ARBITRAIRE DU GOUVERNEMENT, ET L'ARTICLE 52 MET UN FREIN À LA SOUVERAINETE DU PARLEMENT. D'AUTRE PART, L'ARTICLE 33, QUI PRÉVOIT LE RECOURS À UNE CLAUSE DÉROGATOIRE SUR LE PLAN LÉGISLATIF, ET LA FORMULE D'AMENDEMENT RÉTABLISSENT, DANS UNE LARGE MESURE, L'ÉQUILIBRE ANTERIEUR ASSOCIE À LA SOUVERAINETE DU PARLEMENT.

L'UN DES ROLES D'UNE CONSTITUTION CONSISTE À ÉQUILIBRER LES POUVOIRS DU GOUVERNEMENT ET LES DROITS DES INDIVIDUS À L'AIDE DE MÉCANISMES APPROPRIÉS. L'ARTICLE 1 DE LA CHARTE RECONNAT QU'IL N'Y A RIEN D'ABSOLU, QU'IL S'AGISSE DE DROITS INDIVIDUELS OU DE LA PHILOSOPHIE D'UN GOUVERNEMENT. LA CHARTE CONSTITUE UN CADRE DANS LEQUEL ON CHERCHE À ASSURER UN ÉQUILIBRE ADÉQUAT QUI PERMETTE DE PROTÉGER LES DROITS DES INDIVIDUS TOUT EN CONTINUANT DE RECONNATRER LES BESOINS LÉGITIMES DE LA SOCIÉTÉ ET LA LIBERTÉ D'ACTION À LAQUELLE ON DROIT LES GOUVERNEMENTS ET LES LÉGISLATURES EN TANT QUE REPRÉSENTANTS ÉLUS DÉMOCRATIQUEMENT PAR LA POPULATION. AUSSI, LA CHARTE CONFIE-T-ELLE AUX TRIBUNAUX UN RÔLE PLUS IMPORTANT COMME ARBITRE EN CE QUI A TRAIT AUX DROITS FONDAMENTAUX SANS DÉTRUIRE LES PRINCIPES ESSENTIELS DE LA SOUVERAINETE DU PARLEMENT ET DU GOUVERNEMENT RESPONSABLE. CEUX QUI DÉNONCENT L'INCURSION ULTIME DE LA CHARTE DANS LA SUPRÉMATIE DU PARLEMENT SE TROMPENT. IL S'AGIT PLUTOT D'UN FREIN À LA SUPRÉMATIE DE LA BUREAUCRATIE PUISQU'UN SI GRAND NOMBRE DE NOS LOIS SONT EN FAIT DES RÈGLEMENTS, DES LOIS "OCCULTES" QUI NE SONT PAS EXPOSÉES À LA LUMIÈRE DU JOUR NON PLUS QU'À L'EXAMEN OU À LA DISCUSSION PUBLICS, CAR ELLES ÉMANENT DU GOUVERNEUR EN CONSEIL. PERSONNE NE S'EST

OPPOSE, QUE JE SACHE, À CE QU'ON METTE UN FREIN À LA BUREAUCRATIE POUR PROTÉGER LA DÉMOCRATIE. ET CELA CADRE AUSSI AVEC LE PRINCIPE DE LA PRIMAUTÉ DU PRINCIPE DE LA LÉGALITÉ SUR LES RÈGLES QUI ÉMANENT DE L'HOMME.

ON A SOUTENU QUE LE PRINCIPE DE LA LÉGALITÉ OU DE LA PRIMAUTÉ DU DROIT, APPLIQUÉ PAR DES JUGES INDÉPENDANTS, CONSTITUE LE FONDEMENT DE TOUTES NOS LIBERTÉS CONSTITUTIONNELLES. EN BREF, LE PRINCIPE DE LA LÉGALITÉ A POUR BUT DE NOUS PROTÉGER CONTRE UNE INGÉRENCE ARBITRAIRE DU GOUVERNEMENT OU DE SES REPRÉSENTANTS DANS NOS VIES QUOTIDIENNES. C'EST UN PRINCIPE QUI EST RECONNNU DANS NOTRE JURISPRUDENCE, AINSI QUE DANS LE PRÉAMBULE DE LA DÉCLARATION CANADIENNE DES DROITS ET DANS CELUI DE LA CHARTE. LA CHARTE RENFORCE LE PRINCIPE DE LA LÉGALITÉ DANS NOTRE SOCIÉTÉ EN LIMITANT L'ACTION ARBITRAIRE DES GOUVERNEMENTS ET EN SENSIBILISANT LE GOUVERNEMENT ET LE GRAND PUBLIC AUX DROITS ET LIBERTÉS FONDAMENTAUX QUI SONT DE LA PLUS HAUTE IMPORTANCE DANS NOS VIES QUOTIDIENNE. LA CHARTE PLACE LA PERSONNE AVANT LE GOUVERNEMENT ET LUI PERMET DE CONSERVER SES CARACTÉRISTIQUES INDIVIDUELLES DANS UNE SOCIÉTÉ COMPLEXE.

LE GOUVERNEMENT N'ADOpte ÉVIDEMMENT PAS DE LOIS, CAR CE RÔLE APPARTIENT À LA LEGISLATURE. MAIS EN RÉALITÉ, ET NOTAMMENT DANS LE CAS OÙ IL EST MAJORITAIRE, LE GOUVERNEMENT MET DE L'AVANT DES PROJETS QUI TÔT OU TARD DEVIENNENT LOIS. OR, QUE CE SOIT DANS L'ÉLABORATION DE LIGNES DE CONDUITE OU DE PROJETS DE LOI, LE GOUVERNEMENT DEVRA S'ASSURER QU'AUCUNE DE SES PROPOSITIONS NE VA À L'ENCONTRE DE LA CHARTE.

CETTE OBLIGATION N'EST PAS ENTIEREMENT NOUVELLE, DU MOINS AU NIVEAU FÉDÉRAL, PUISQU'EN VERTU DE L'ARTICLE 3 DE LA DÉCLARATION CANADIENNE DES DROITS, LE MINISTRE FÉDÉRAL DE LA JUSTICE A LE DEVOIR DE S'ASSURER QUE LES

PROJETS DE RÈGLEMENTS ET DE LOIS SONT COMPATIBLES AVEC LADITE DECLARATION. EN RAISON DE L'ADOPTION DE LA CHARTE, LE MINISTRE DE LA JUSTICE PRÉSENTERA DONC UN PROJET DE LOI POUR ÉNONCER EXPRESSÉMENT LA RESPONSABILITÉ QUI INCOMBE AU MINISTRE DE LA JUSTICE D'ASSURER LA CONFORMITÉ DES LOIS FÉDÉRALES AVEC LA CHARTE, UNE PRATIQUE PRÉSENTEMENT EN VIGUEUR.

LE GOUVERNEMENT DANS SON ENSEMBLE DEVRA ÊTRE VIGILANT POUR S'ASSURER QUE L'ON TIENNE COMPTE DE LA CHARTE DANS L'ÉLABORATION OU L'APPLICATION DES POLITIQUES, DES PRATIQUES, DES LOIS ET DES RÈGLEMENTS. BIEN QUE CETTE RESPONSABILITÉ INCOMBE À L'ENSEMBLE DU GOUVERNEMENT, ELLE REVÈT UNE IMPORTANCE PARTICULIÈRE POUR LE MINISTRE DE LA JUSTICE QUI DOIT, EN SA QUALITÉ DE CONSEILLER JURIDIQUE DU GOUVERNEMENT, VEILLER À CE QUE L'ADMINISTRATION DES AFFAIRES PUBLIQUES SOIT CONFORME À LA LOI. IL Y A ÉGALEMENT LIEU DE RAPPELER QUE LE PROCUREUR GÉNÉRAL A, POUR SA PART, LA TÂCHE DE CONSEILLER LES CHEFS DES DIVERS MINISTÈRES DU GOUVERNEMENT SUR TOUTE MATIÈRE DE DROIT QUI LES INTÉRESSE. DE PLUS, IL REPRÉSENTE LE GOUVERNEMENT DANS TOUT LITIGE AUQUEL CE DERNIER EST PARTIE. IL EXISTE DONC UNE DOUBLE RESPONSABILITÉ, CELLE DU MINISTRE DE LA JUSTICE ET CELLE DU PROCUREUR GÉNÉRAL. POUR SA PART, LE MINISTRE DE LA JUSTICE, DONT LES RESPONSABILITÉS S'ÉTENDENT À L'ENSEMBLE DU SYSTÈME JURIDIQUE FÉDÉRAL, DOIT VEILLER AU RESPECT DE LA CHARTE DES DROITS ET LIBERTÉS AINSI QUE DES AUTRES PRINCIPES D'ADMINISTRATION DE LA JUSTICE ET DES RÈGLES CONSTITUTIONNELLES. LE PROCUREUR GÉNÉRAL DOIT, DE SON CÔTÉ, S'ASSURER QUE LA POURSUITE DES INTÉRÊTS ET DES OBJECTIFS DE SON CLIENT S'EFFECTUE EN CONFORMITÉ DE LA LOI.

LE MINISTÈRE DE LA JUSTICE DOIT DONC ÊTRE CONSCIENT DES ÉVENTUELS CONFLITS ENTRE LE RÔLE DU MINISTRE DE LA JUSTICE ET CELUI DU PROCUREUR GÉNÉRAL. COMME L'ONT SOULIGNE QUELQUES GROUPES VIGILANTS DE DÉFENSE DES DROITS DES FEMMES, L'ÉVENTUALITÉ D'UN TEL CONFLIT S'EST MANIFESTÉE DAVANTAGE PAR RAPPORT À DEUX QUESTIONS QUI REVÈTENT UNE IMPORTANCE PARTICULIÈRE POUR EUX. COMME LE MINISTRE DE LA JUSTICE EST CHARGE DE PROMOUVOIR ET D'ÉLABORER DES LOIS COMME LA DÉCLARATION CANADIENNE DES DROITS ET LA CHARTE, IL A CONTRIBUÉ À ASSURER LA PROTECTION EXPRESSE DES DROITS À L'ÉGALITÉ. TOUTEFOIS, À TITRE DE PROCUREUR GÉNÉRAL, IL PLAIDE DEVANT LES TRIBUNAUX, DANS DES AFFAIRES COMME L'AFFAIRE LAVELL ET L'AFFAIRE BLISS, CONTRE L'APPLICATION DES DROITS À L'ÉGALITÉ DANS DES SITUATIONS PRÉCISES COMME C'EST SON RÔLE PUISQUE, COMME TOUT AVOCAT, LE PROCUREUR GÉNÉRAL REÇOIT DES INSTRUCTIONS DE SES CLIENTS. ÉVIDEMMENT, IL DOIT AUSSI ESSAYER DE CONVAINCRE LES MINISTÈRES, LORSQUE LEUR POSITION EST INCERTAINE, DE MODIFIER LA LOI OU LES RÈGLEMENTS EN CAUSE. MAIS LORSQU'UN ARGUMENT JURIDIQUE VALIDE EXISTE, IL EST DE SON DEVOIR, EN TANT QUE PROCUREUR GÉNÉRAL, DE SUIVRE LES INSTRUCTIONS DE SON CLIENT SI CE DERNIER DÉSIRE PORTER L'AFFAIRE DEVANT LES TRIBUNAUX.

DANS NOTRE GOUVERNEMENT, LE MINISTRE DE LA JUSTICE ET LE PROCUREUR GÉNÉRAL SONT ÉVIDEMMENT UNE SEULE ET MÊME PERSONNE. IL S'AGIT LÀ D'UNE PRATIQUE QUE L'ON SUIT AU CANADA ET DANS LES PROVINCES DEPUIS AVANT LA CONFÉDÉRATION. CEPENDANT, UNE PERSONNE QUI DÉTIENT DEUX TITRES COMME CEUX-LÀ DOIT PRENDRE GARDE DE NE PAS CONFONDRE LES DIFFÉRENTES RESPONSABILITÉS ATTACHÉES AUX DIFFÉRENTS RÔLES QU'ELLE INCARNE. À MON AVIS, LA CHARTE SOULIGNERA DAVANTAGE LES DEUX RÔLES DU MINISTÈRE DE LA JUSTICE EN RAISON DU CARACTÈRE DÉLICAT, DE LA COMPLEXITÉ ET DU NOMBRE DES QUESTIONS QUI SERONT SOULEVÉES.

L'EXISTENCE DE LA CHARTE AUGMENTERA SANS DOUTE LA CHARGE DE TRAVAIL DU MINISTRE DE LA JUSTICE ET DU PROCUREUR GÉNÉRAL. QUE CE SOIT AU NIVEAU PROVINCIAL OU AU NIVEAU FÉDÉRAL, IL SEMBLE ÉVIDENT QU'IL FAUDRA PRENDRE DES MESURES POUR LUI PERMETTRE DE COORDONNER ET DE PROMOUVOIR DE FAÇON ADÉQUATE L'ACTUELLE MISE EN OEUVRE DE LA CHARTE ET DE S'ASSURER QUE LE GOUVERNEMENT REMPLIT SES FONCTIONS CONFORMÉMENT À SES DISPOSITIONS.

LE MINISTÈRE FÉDÉRAL DE LA JUSTICE VIENT EN AIDE À TOUS LES MINISTÈRES DU GOUVERNEMENT POUR EFFECTUER UNE RÉVISION COMPLÈTE DES LOIS, DES POLITIQUES, DES PRATIQUES ET DES PROGRAMMES AFIN DE LES RENDRE CONFORMES À LA CHARTE. ON ME DIT QUE LES GOUVERNEMENTS PROVINCIAUX ONT ÉGALEMENT ENTREPRIS UN TRAVAIL SEMBLABLE. LE MINISTÈRE A INSTITUÉ UNE SECTION DES DROITS DE LA PERSONNE POUR SECONDER LES AVOCATS AFFECTÉS AUX DIFFÉRENTS MINISTÈRES QUI DEVONT TRAVAILLER DIRECTEMENT AVEC CES DERNIERS POUR MENER À BIEN CETTE RÉVISION. UNE FOIS CETTE TÂCHE ACCOMPLIE, IL EST À PRÉVOIR QU'UN PROJET DE LOI OMNIBUS PRÉVOYANT LES MODIFICATIONS NÉCESSAIRES SERA DÉPOSÉ AU PARLEMENT. IL FAUT AUSSI SOULIGNER QUE CE TRAVAIL SERVIRA À INFORMER LES FONCTIONNAIRES DU GOUVERNEMENT DE LA TENEUR DE LA CHARTE ET À LES Y SENSIBILISER.

IL SE PEUT QUE LE PRINCIPAL EFFET DE LA CHARTE SUR LES GOUVERNEMENTS SOIT DE LES FORCER À TROUVER DES MOYENS PLUS JUSTES ET PLUS DÉLICATS D'ÉQUILIBRER LES DIVERS INTÉRÊTS QUI SERONT ENGENDRÉS PAR LES DROITS RECONNUS DANS LA CHARTE. À TITRE D'EXEMPLE, LA LIBERTÉ D'ASSOCIATION VISE À LA FOIS LE CONCEPT DE L'ASSOCIATION FORCÉE PAR LE BIAIS D'ORGANISMES QUI N'ADMETTENT QUE DES TRAVAILLEURS SYNDIQUÉS ET CELUI DU DROIT D'UNE PERSONNE DE REFUSER DE S'ASSOCIER. C'EST L'ARTICLE 15 DE LA CHARTE QUI FAIT PEUT-ÊTRE LE PLUS

RESSORTIR L'EXISTENCE DANS CELLE-CI DE TELLES PRÉTENTIONS CONTRADICTOIRES OU S'AFFRONTENT L'INTERET DE LA COLLECTIVITÉ ET L'INTÉRÊT INDIVIDUEL. TOUTE DISTINCTION CONSTITUE, EN THÉORIE, UNE DISCRIMINATION. CEPENDANT, LA SOCIÉTÉ PEUT ET DOIT ÉTABLIR CERTAINES DISTINCTIONS LÉGITIMES. LA CHARTE AURA POUR EFFET DE SOULIGNER LA NÉCESSITÉ D'ÉTABLIR DE TELLES DISTINCTIONS AVEC PLUS DE SOINS QU'AUPARAVANT.

JE N'AI ÉTUDIÉ QUE BRIÈVEMENT LES EFFETS DE LA CHARTE SUR LES PRINCIPES GÉNÉRAUX SUR LESQUELS REPOSE LE RÔLE DE NOS GOUVERNEMENTS. CEPENDANT, JE SUIS D'AVIS QUE LA CHARTE AURA CERTAINEMENT DES EFFETS SUR TOUS LES ASPECTS DES ACTIVITÉS DES GOUVERNEMENTS QUE CE SOIT DANS LEUR RÔLE D'INITIATEURS DE LOI, D'EMPLOYEURS, D'ADMINISTRATEURS, DE RESPONSABLES DE L'APPLICATION DE LA LOI, BREF, DANS TOUTES LEURS ACTIVITÉS.

FONDAMENTALEMENT, LE RÔLE D'UN GOUVERNEMENT EST DE GOUVERNER, MAIS IL DOIT LE FAIRE DE FAÇON JUDICIEUSE. L'EFFET LE PLUS MARQUANT DE LA CHARTE SERA PEUT-ÊTRE DE VOIR APPARAÎTRE UNE NOUVELLE PRISE DE CONSCIENCE DES DROITS ET LIBERTÉS INDIVIDUELS DANS L'ENSEMBLE DE L'ACTIVITÉ GOUVERNEMENTALE, AJOUTANT À L'ÉLÉMENT DE DISCERNEMENT.

QUOIQUE CETTE OBSERVATION PUISSE CONSTITUER UNE CONCLUSION APPROPRIÉE À MES PROPOS D'AUJOURD'HUI, J'AIMERAIS AJOUTER QUE LA VALEUR D'UNE CHARTE DES DROITS ET LIBERTÉS SE DÉGAGE DAVANTAGE DE LA CITATION SUIVANTE, QUI REFLETTRE L'OPINION DE L'ASSOCIATION DU BARREAU CANADIEN ET SE RAPPORTE DIRECTEMENT AU SUJET TRAITÉ:

[TRADUCTION] "L'IMPORTANCE, SUR LES PLANS SYMBOLIQUE ET ÉDUCATIF, DE PROCLAMER QUE LES DROITS DE L'INDIVIDU NE SONT PAS À LA MERCI D'UNE MAJORITÉ TEMPORAIRE AU PARLEMENT NE PEUT GUÈRE ÊTRE EXAGÉRÉE. L'INSERTION DANS LA CONSTITUTION DES VALEURS FONDAMENTALES QUE PARTAGENT TOUS LES CANADIENS AURAIT, À NOTRE AVIS, UN EFFET UNIFI-CATEUR CONSIDÉRABLE. CE GESTE FERAIT PRENDRE CONSCIENCE À TOUS LES CITOYENS, QUEL QUE SOIT LEUR ÂGE, DE L'IMPOR-TANCE DES LIBERTÉS PUBLIQUES ET CONSACRERAIT AINSI À LEURS YEUX LES LIBERTÉS ET LES DROITS PARTICULIERS QUE NOTRE SOCIÉTÉ CONSIDÈRE COMME FONDAMENTAUX. CELA FOURNI-RAIT AUX POLITICIENS ET AUX FONCTIONNAIRES UNE NORME OFFICIELLE POUR EXAMINER SOIGNEUSEMENT NON SEULEMENT LES LOIS MAIS AUSSI LES RÈGLEMENTS.

EN PLUS DE SON RÔLE SUR LES PLANS SYMBOLIQUE ET ÉDUCATIF, UNE DÉCLARATION DES DROITS PEUT ÊTRE UN MOYEN EFFICACE D'APPLIQUER LES DROITS POLITIQUES ET CEUX QUE GARANTIS-SENT LES LOIS TOUT PARTICULIÈREMENT. LES TRIBUNAUX PEUVENT INVALIDER LES LOIS QUI VIOLENT LES DROITS CONSTI-TUTIONNELS. EN L'ABSENCE DE DROITS GARANTIS, UNE MAJORITÉ QUI SIÈGE TEMPORAIREMENT AU PARLEMENT OU À UNE LÉGISLATURE PEUT CAUSER UN TORT INCOMMENSURABLE À UNE MINORITÉ OU À UN INDIVIDU. CONTRAIREMENT AUX LOIS EXISTANTES SUR LES DROITS DE LA PERSONNE, QUI PEUVENT

TOUJOURS ÊTRE ABROGÉES OU MODIFIÉES PAR UNE AUTRE LOI, UNE TELLE DECLARATION EMPÈCHERAIT LES PARLEMENTS ET LES GOUVERNEMENTS D'ALLER À L'ENCONTRE DES DROITS DE LA PERSONNE. CETTE PROTECTION EST DES PLUS IMPORTANTES DANS UN ÉTAT ADMINISTRATIF MODERNE COMME LE NÔTRE OÙ ON FAIT GRANDEMENT APPEL À LA LÉGISLATION DÉLEGUÉE, LAQUELLE N'EST PAS SOUMISE AU GENRE D'EXAMEN QUI INTERVIENT DANS LES DÉBATS PARLEMENTAIRES."

POUR TERMINER, J'AI EU L'OCCASION RÉCEMMENT DE LIRE LE PASSAGE SUIVANT, TIRÉ D'UN LIVRE INTITULÉ "THE CANADIAN POLITICAL SYSTEM", QUI EST, JE CROIS, UN TEXTE UTILISÉ DEPUIS PLUSIEURS ANNÉES PAR DES PROFESSEURS D'AU MOINS UNE UNIVERSITÉ CANADIENNE. CE PASSAGE SE LIT COMME SUIT:

[TRADUCTION] "UNE CONSTITUTION EST, OU DEVRAIT ÊTRE, UNE SOURCE DE FIERTÉ ET UN FACTEUR D'UNIFICATION AU SEIN D'UNE SOCIÉTÉ. LE PROFESSEUR CHEFFINS A DÉCRIT UNE CONSTITUTION COMME "(...) UN MIROIR QUI REFLETTÉ L'ÂME D'UN PEUPLE (...)" GÉNÉRALEMENT PARLANT, CETTE AFFIRMATION EST JUSTE ET S'APPLIQUE CERTAINEMENT À LA CONSTITUTION DES ÉTATS-UNIS ET À LA CONSTITUTION "NON ÉCRITE" DU ROYAUME-UNI. DANS CHACUN DE CES SYSTÈMES, LA CONSTITUTION EST DEVENUE, POUR DES RAISONS TRÈS DIFFÉRENTES, UN SYMBOLE DU CARACTÈRE DÉMOCRATIQUE DE LA SOCIÉTÉ ET UN OBJET DE FIERTÉ NATIONALE. IL EST POSSIBLE QUE LE CANADA NE POSSÈDE PAS L'"ÂME D'UN PEUPLE", MAIS SI NOUS AVONS LA CHANCE D'AVOIR UNE CHOSE AUSSI RARE, NOUS POUVONS DIFFICILEMENT SOUTENIR QUE NOTRE CONSTITUTION, DONT ON DIT BEAUCOUP DE MAL, PUISSE ÊTRE AINSI QUALIFIÉE DE "MIROIR".

JE SUIS FIER DE POUVOIR DIRE, À CAUSE DES RÉPERCUSSIONS QU'AURA LA CHARTE, QU'IL S'AGIT LÀ D'UN PASSAGE QU'À MON AVIS, SES AUTEURS DEVONT RÉVISER DANS LES PROCHAINES ÉDITIONS DE LEUR OUVRAGE.

DOCUMENT: 840-224/012



1982 CASHRA ANNUAL CONFERENCE

Extract from Notes for Address to
the Second International Ombudsmen's Conference
October 27-31, 1980, Jerusalem

by

Inger Hansen, Q.C.
Privacy Commissioner

Panel: Human Rights Investigations and Access to
Information and Privacy Legislation

Montebello, Quebec
May 31 - June 2, 1982

ACCESS TO INFORMATION - THE ROLE OF THE OMBUDSMAN

Ombudsmen should be concerned with the developments of information rights. Your offices may be affected in various ways:

- 1) Access to your files may be granted to the public,
- 2) Authority to gain access to information relevant to your investigations may be limited or expanded by new laws,
- 3) Your workload may increase,
- 4) You may become subject to control by a Data Commission,
- 5) You may be appointed to investigate complaints from individuals who allege they have not been accorded information rights to which they are entitled under laws enacted by your country.

I will deal with these matters in that order.

Your Files

Legislation may grant access by clients or by the public in general to records held by ombudsmen. On the assumption that this could happen, you may wish to consider what exemptions you believe necessary to protect the integrity of your investigations. For example: You may need protection from disclosure of investigative techniques or sources of information. You may wish to train your staff to change their report-writing to make the task of disclosure easier.

Furthermore, the arrangements of reports may have to be changed to separate facts from conclusions, something persons without special training find hard to do. You may also wish to stress that your staff should not make judgments which they do not have the professional credentials to reach. For example, if your investigators (not being psychiatrists) report that "complainant suffered from delusions", you may want it changed to "the complainant insisted there were little electronic listening devices installed in his brain", so that the reader may draw his or her own conclusions. You may have to instruct staff to refrain from scribbling gratuitous comments on files. Finally, you may wish to insist that only one person or problem be dealt with in each document because this saves claiming exemptions to protect the privacy of the one who has not asked for his or her records.

You may wish to establish a regular schedule for destruction of data held by your office.

Your Right of Access

Most ombudsmen have extensive powers to compel the production of evidence. If legislation is proposed in your jurisdiction,

you may wish to make representations to ensure that your authority to obtain evidence not be diminished by any new laws. This could happen accidentally, or otherwise, depending on how exemptions are phrased in the law.

Ombudsmen may be faced with legislation that provides them with access to exempted information for purposes of investigating complaints, but at the same time, prohibits them from disclosing the information. This is the case under Part IV of the Canadian Human Rights Act (and the new Bill).

The Privacy Commissioner is now able to investigate, to ensure that nothing has been unlawfully withheld from a complainant in a totally closed information bank. However, if a complaint cannot be substantiated, I am faced with having to report to the complainant: "You have been fairly dealt with, but I cannot tell you why...". Nevertheless, the benefits of having access for investigatory purposes become obvious in cases where information that has been withheld is released (by the department) as a result of representations or recommendations from my office to a minister. If an Information Commissioner did not have access to closed banks, administrators could simply hide documents, or documents could be placed in the inaccessible information banks in error.

Of course, it is possible that legislation might increase your ability to obtain information and thus make your lot a little easier. I believe none of you would object to such provisions.

Your Workload

It is also possible that the right of access by the public to information will increase the workload of ombudsmen. Matters that would have gone unnoticed without access to files will become the subject of complaints. Moreover, it may be useful for an ombudsman's preliminary assessment of a complaint about maladministration to have the client seek access to his or her records, and bring the information to the office of the ombudsman. This, I believe, would be particularly useful in jurisdictions where the ombudsman is compelled to give notice before being entitled to commence even a preliminary inquiry into a complaint.

Data Commission

Some jurisdictions provide for the control of the collection, use, and transmission of data. The control is usually in the hands of independent Data Protection Commissions. It is possible that legislation will require you to obtain a licence

to collect data and that the Data Protection Commission may impose conditions on you for that purpose.

For example, the Norwegian Data Act "Law Concerning Registers of Persons" (Personal Information Data Banks) provides inter alia that the Norwegian Data Commission is to give advice and guidance concerning privacy and security of data to those who intend to establish data banks containing personal information. The Commission may "express itself both as a result of complaints and on its own initiative concerning the use made of information contained in such registers". Consent from the King, i.e. the government, is required for the establishment of electronic records in all cases, and consent is required to collect, regardless of how stored:

- 1) information about race, political or religious opinions
- 2) information that a person has been suspected, charged or convicted of an offence
- 3) information about a person's health or use of intoxicants
- 4) information about sexual relations
- 5) other information about family and other similar relationships concerning genealogical or civil status, financial status between spouses or responsibility for dependents.

To fulfill its mandate, the Data Commission has authority to obtain the necessary information, has access to data banks

and to perform the tests it deems necessary. The duty to keep data confidential, i.e. privilege against disclosure, cannot be claimed in respect requests from the Data Commission.

(1)

The Generalist Ombudsman as Information Ombudsman

I believe all ombudsmen are already involved in solving problems of access to information. If a case of maladministration has occurred because information has not been given to an individual, the ombudsman concerned would surely speak up.

There is, I suggest, no reason why the task of investigating complaints about access to information cannot be handled by existing ombudsmen in their respective jurisdictions. Indeed, the ombudsman of New Brunswick, Canada, Joseph Bérubé, has recently taken on such duties under a new law. Ombudsmen's offices are excellently equipped to handle information complaints. The administrators with whom the ombudsman would deal, in relation to information complaints, would probably be the same. The way in which complaints are handled would be similar, if not the same.

(1) Translation by author

In addition to dealing with complaints concerning administrative actions related to the rights in Part IV, the Privacy Commissioner is charged with reviewing ministerial decisions to withhold information from applicants. The minister, no doubt, acts on the advice of administrators when claiming exemptions from disclosure, but if I find that an individual has not been accorded a legal right established by Part IV, I have a statutory duty to report to the minister and to the complainant. I may also include the finding in my annual report to Parliament.

Granting authority to an ombudsman to investigate ministerial decisions or failure to grant legal rights does not, in my opinion, create any difficulties for an ombudsman, but authorizing an ombudsman to reverse ministerial decisions might not be desirable.

The traditional, almost unlimited, authority for ombudsmen to investigate and to act informally when investigating complaints has worked well, precisely, I submit, because an ombudsman has neither judicial nor political authority. Giving decision-making authority to an ombudsman or an Information Commissioner may have popular appeal. Indeed,

in Canada, ombudsmen are sometimes called toothless tigers and movements are afoot from time to time to give them "more clout". I disagree with such suggestions.

If an ombudsman is given authority to reverse decisions, the ombudsman must develop judicial distance. The easy resolution of complaints through informal methods will become rare, if not impossible. Once an ombudsman has the attributes of a court, negotiations and mediation at lower administrative levels will become infrequent. Administrators may become defensive and may insist that cases be put in writing and be formally presented. There will be fewer opportunities to present the complainant's case orally in order to ascertain facts only known to administrators. Positions will become polarized too soon.

Furthermore, if an ombudsman has decision-making power, there should be procedural (and therefore time-consuming) safeguards for public servants who may be adversely affected by the ombudsman's decisions.

My objection is not to judicial review but to clothing the ombudsman with judicial powers. Indeed, if the final decision on access is to rest with the courts, I would favour

granting authority to the Information Commissioner to refer issues to the court on behalf of a complainant, so that important issues may be finally reviewed by the courts, even if the complainant cannot afford a lawyer.

As previously mentioned, the Bill now before Parliament provides for appeal to the courts after an individual has sought the assistance of the Information Commissioner or the Privacy Commissioner, and the Commissioners as well as complainants would have the right to take cases to court. The cases that do go to court will eventually provide a useful set of precedents to assist in the informal solution of complaints. In my opinion, only 5% of the cases I have dealt with would warrant examination by lawyers and the courts.

CONCLUSION

If I have learned anything since the telephone call in 1977 made on behalf of the Minister of Justice, it is this: Most people are in favour of freedom of information and personal information rights...until they realize that the principles may apply to information they prepared. It takes time to get used to a complete reversal of principles. It takes time

and effort to learn to write objective reports.

People are anxious because information that was prepared or collected long before information rights were incorporated in law may become available. Information laws have retroactive effect because it is difficult to make the date of proclamation of the law the cut-off point. If the information collected before that date is still available on file, it is subject to disclosure.

It was interesting to discover that police forces and the military in Canada adjusted more quickly to the new laws than did other departments. I should add that our penal institutions experienced the same administrative nightmare as a result of our privacy laws as they did in the U.S.A. Prisoners' requests for access have not been fulfilled because as the department keeps telling them, "the volume of requests exceeds the capacity to respond".

New rights mean new problems. It is obvious that many new challenges for ombudsmen, for lawyers, managers and employees, businesses and their customers, will have to be faced as a result of legislation of information rights. I think there is no turning back. I am in favour of as much

disclosure of information as possible. But I also believe in balancing disclosure with protection of the privacy of others and with the general public interest and the safety of society as a whole.

In closing, permit me to make a few comments based on my seven years in the ombuds-field.

My self-image does not require a white horse, my actions should never be to rubber-stamp government actions. I try to treat complainants and bureaucrats with equal respect. I remind myself constantly not to go on a witch-hunt against the bureaucracy and not to put down complaints as trivial. If the complaint were trivial, the complainant would probably not have bothered. I try to remember that "frivolous and vexatious" is often in the eye of the beholder.

Oh yes, I know there are chronic complainers. I am not so naive as to think they do not exist. They are, however, small in number. Their complaints deserve to be investigated as well. Even a chronic complainer may have valid complaints. If a complaint cannot be substantiated, our office answers the complainant firmly but lets him down gently.

People may ask: Is the whole exercise worthwhile? Certainly, I would say, for the individual helped. But, I hope also, because of the indirect impact on administrative practices. If ombudsmen discover errors, oversights and hardships, and they cause them to be corrected, everyone is better off. In both my jobs, I generally found that roughly 20% of the complaints could not be justified, approximately 60% fell in the large group where something had failed, explanations were necessary and in approximately 20%, something had to be done to rectify a valid complaint. I understand that these percentages are similar for other ombudsmen. Well, some may say, if it is that low for justified complaints, why bother? And I would answer that if it's that high, the ombudsman is a necessary check, an audit on the whole system. If it were higher, we should be worried. Ombudsmen are auditors of administrative systems. But we find frequently in our investigations that dissatisfaction with the bureaucracy results not from unwillingness to comply with policy or law but from failure of communication. Such failure of communication is more easily discovered and resolved by an outsider. The ombudsman's office communicates for both parties.

When an individual has been turned down by the bureaucracy on the grounds that to remedy the wrong would be unfair to society at large, an ombudsman must listen very carefully. It is, of course, possible that society cannot provide personalized justice; but the ombudsman should ask himself: Is the policy actually fair in terms of the whole of society? Could something be done to relieve the particular hardship without destroying the general policy, without being unfair to others? Is the law unjust?

The primary duty of an ombudsman is to serve those who have bothered to complain. I know this makes for disjointed reports and recommendations that do not come forth in an orderly progression. Of course, it is far more satisfying intellectually to develop broad policy recommendations, but that is not the ombudsman's job. I firmly believe that ombudsmen should take care not to set themselves up as general policy advisors to government, or indeed policy makers. What are politicians and administrators for? What are Royal Commissions for? There is no other institution, but the office of the ombudsman who can say to the individual: "You have a problem with bureaucracy? Well, I have been given resources to look into it; I'll do my best to see that

you are treated fairly...and my office is beholden, neither to the bureaucracy nor to the politicians".

Let's all fight to keep it that way.



Government
Publications

CONFERENCE ANNUELLE 1982 DE L'ACOSPDH

Extrait de notes pour un discours à la
deuxième Conférence internationale des protecteurs du citoyen
du 27 au 31 octobre 1980 - Jérusalem

Inger Hansen, c.r.
Commissaire à la protection de la vie privée

Débat: Les enquêtes dans le domaine des droits de
la personne et les législations en matière
d'accès à l'information et de protection de
la vie privée

Montebello (Québec)
du 31 mai au 2 juin 1982

ACCES A L'INFORMATION - LE ROLE DU PROTECTEUR DU CITOYEN

Les protecteurs des citoyens devraient s'intéresser au développement des droits à l'information. Vos charges peuvent en être affectées de diverses façons:

- 1) Le public peut recevoir accès à vos dossiers,
- 2) Le pouvoir d'obtenir l'accès à des informations pertinentes dans vos enquêtes peut être limitée ou étendu par de nouvelles lois,
- 3) Votre charge de travail peut être augmentée,
- 4) Vous pouvez devenir l'objet du contrôle d'une Commission des données,
- 5) Vous pouvez être appelés à faire enquête sur des plaintes émanant de particuliers qui allèguent s'être vus refuser les droits à l'information qui leur sont conférés par des lois promulguées dans votre pays.

Je traiterai de ces questions dans cet ordre.

Vos dossiers

La législation peut donner accès aux clients ou au public en général aux archives détenues par les ombudsmen. En supposant que cela sera le cas, vous voudrez peut-être réfléchir aux exemptions qui vous paraissaient nécessaires pour protéger l'intégrité de vos enquêtes. Par exemple, vous

pouvez souhaiter de ne pas avoir à divulguer vos techniques d'enquête ou vos sources d'informations. Vous pouvez être amenés à faire en sorte que votre personnel modifie sa manière de rédiger les rapports afin de faciliter la tâche de divulgation. Par ailleurs, la présentation des rapports pourra avoir à changer afin de distinguer les faits des conclusions, ce qui est difficile à faire pour des personnes sans formation spéciale. Vous pourrez également avoir à souligner que votre personnel ne doit pas prononcer des jugements pour lesquels il ne dispose pas des compétences professionnelles voulues. Par exemple, si vos enquêteurs (n'étant pas des psychiatres) rapportent que "le plaignant souffre d'~~illusions~~ ^{hallucinations}", vous pourrez souhaiter inscrire à la place "le plaignant affirmait qu'il y avait de petits appareils d'écoute électronique posés dans son cerveau", laissant le lecteur tirer ses propres conclusions. Vous aurez peut-être à ordonner à votre personnel de se retenir de griffouiller des commentaires gratuits sur les dossiers. Enfin, vous pourrez être amenés à insister qu'une seule personne ou un seul problème fasse l'objet d'un même document car cela évite d'avoir à demander des exemptions pour protéger la vie privée de celui ou celle qui n'a pas demandé à voir son dossier.

Vous souhaiterez également établir un calendrier fixe pour la destruction des données détenues par votre service.

Votre droit d'accès

La plupart des ombudsmen ont d'importants pouvoirs qui leur permettent d'exiger la production de pièces. Si l'on envisage d'adopter une nouvelle législation dans votre juridiction, vous pourrez être amenés à intervenir afin d'assurer que votre pouvoir de le faire ne soit pas réduit. Cela pourrait se produire accidentellement, ou de toute autre façon, selon la façon dont la loi est libellée.

Les ombudsmen se trouvent parfois pris avec une législation qui leur donne accès à des informations secrètes aux fins de leur enquête sur une plainte mais en même temps leur interdit de divulguer cette information. C'est le cas de la Partie IV de la Loi canadienne sur les droits de la personne (ainsi que du nouveau projet de loi).

Le Commissaire à la protection de la vie privée est maintenant habilité à faire enquête, à s'assurer que rien n'a été illégalement caché à un plaignant dans une banque de données entièrement fermée. Cependant, si la plainte s'avère injustifiée, je me trouve contraint de déclarer au plaignant: "vous avez été équitablement traité mais je ne peux pas vous dire pourquoi...". Néanmoins, l'avantage d'avoir accès à des fins d'enquête devient évident dans les cas où une information est finalement divulguée (par le ministère) à la suite des interventions ou des recommandations faites par mon bureau auprès d'un ministre. Si un Commissaire à l'information n'avait pas accès aux banques

restreintes, les administrateurs pourraient simplement cacher des documents ou les placer par erreur dans des banques d'informations inaccessibles. Bien entendu, il est possible qu'une législation augmente en fait votre latitude d'obtenir des informations et vous facilite ainsi la vie. Je suis bien sûr qu'aucun d'entre vous n'élèverait d'objection contre une telle disposition.

Votre charge de travail

Il est également possible que le droit d'accès à l'information donné au public accroisse la charge de travail des protecteurs du citoyen. Des choses qui n'auraient jamais été remarquées sans l'accès aux dossiers feront l'objet de plaintes. De plus, il pourrait être utile pour l'évaluation préliminaire que fait le protecteur d'une plainte de demander au client de chercher à consulter ses dossiers et de lui rapporter les informations ainsi découvertes. Cela s'avérerait particulièrement utile dans les juridictions où le protecteur est tenu de donner préavis avant d'entamer même une enquête préliminaire sur une plainte.

Commissions des données

Certaines juridictions ont instauré un contrôle sur la collecte, l'utilisation et la transmission de données. Ce contrôle est généralement exercé par des commissions de protection des données indépendantes. Il est possible que la

législation vous oblige à obtenir une licence pour recueillir des données et que la Commission de protection des données vous impose à cet effet des conditions.

Par exemple, la "Loi concernant les registres des personnes" norvégienne (banque de données d'informations personnelles) stipule entre autres que la Commission norvégienne des données donne des avis et des directives concernant la confidentialité et la sécurité des renseignements à ceux qui ont l'intention d'établir des banques de données contenant des renseignements personnels. La Commission peut "s'exprimer aussi bien à la suite de plaintes que de sa propre initiative sur l'utilisation faite des informations contenues dans de tels registres". Le consentement du Roi, c'est-à-dire du Gouvernement, est requis dans tous les cas pour l'établissement de fichiers électroniques ainsi que pour recueillir, indépendamment du mode de conservation:

- 1) des informations sur la race, les opinions politiques ou religieuses
- 2) des informations indiquant qu'une personne a été suspectée, inculpée ou condamnée pour un délit
- 3) des informations sur la santé d'une personne ou son usage de produits intoxicants
- 4) des informations sur les relations sexuelles

5) d'autres informations sur la famille et d'autres relations similaires concernant la situation généalogique ou civile, la situation financière entre conjoints ou la responsabilité vis-à-vis de dépendants.

Afin de remplir son mandat, la Commission des données a le pouvoir d'obtenir les informations nécessaires, a accès aux banques de données et à faire les enquêtes nécessaires. L'obligation de préserver la confidentialité des données, c'est-à-dire l'immunité contre la divulgation, ne peut être revendiquée pour ce qui est des demandes présentées par la Commission des données.

Le protecteur généraliste et l'information

Je crois que tous les ombudsmen ont déjà à résoudre des problèmes portant sur l'accès à l'information. S'il se produit un cas d'abus où des renseignements ont été refusés à quelqu'un, l'ombudsmen intéressé relèvera certainement l'affaire.

J'estime qu'il n'existe aucune raison pour laquelle les protecteurs du citoyen existant dans leur juridiction respective ne pourraient pas traiter les plaintes concernant l'accès à l'information. De fait, le protecteur du citoyen du Nouveau-Brunswick au Canada, Joseph Bérubé, vient d'acquérir de telles fonctions aux termes d'une nouvelle loi. Les services des protecteurs sont excellemment équipés pour s'acquitter de cette tâche. Les administrateurs auxquels le

protecteur aura affaire dans ce genre d'enquête seront les mêmes. La façon dont les plaintes seront traitées sera similaire, sinon identique.

Outre que de traiter les plaintes portant sur des actes administratifs dans le cadre des droits énoncés à la Partie IV, le Commissaire à la vie privée est chargé d'examiner les décisions ministérielles de refuser de communiquer des renseignements à certains demandeurs. Le ministre, sans aucun doute, agit sur l'avis d'administrateurs en ce faisant mais si je juge qu'un particulier s'est vu refuser un droit légal stipulé par la Partie IV, j'ai l'obligation statutaire d'en faire rapport au ministre et au plaignant. Je peux également inclure ce jugement dans mon rapport annuel au Parlement.

De donner à un protecteur du citoyen le pouvoir de faire enquête sur des décisions ministérielles ou sur le manquement à respecter des droits légaux ne crée pas, à mon sens, de difficulté, alors que d'autoriser un protecteur à renverser des décisions ministérielles n'est pas nécessairement souhaitable.

C'est précisément parce qu'un protecteur n'a pas de pouvoir judiciaire ou politique que sa latitude traditionnelle, presque illimitée, de faire enquête et d'agir officieusement donne d'aussi bons résultats. Ce serait peut-être un acte

populaire que de donner à un protecteur du citoyen ou à un Commissaire à l'information un pouvoir de décision. De fait, au Canada, on qualifie parfois les protecteurs du citoyen de tigres de papier et des mouvements se produisent à intervalles réguliers afin de leur donner plus de "poids". Je ne suis pas d'accord avec de telles suggestions.

Si un protecteur reçoit le pouvoir de renverser des décisions, il devra faire preuve d'une certaine réserve judiciaire. Il deviendra rare, sinon impossible, de résoudre une plainte par des méthodes informelles. Une fois qu'un protecteur possède les attributions d'un tribunal, les négociations et la médiation aux niveaux administratifs inférieurs deviendront rares. Les administrateurs se mettront sur la défensive et insisteront pour que les demandes soient mises par écrit et présentées officiellement. Il y aura moins d'occasions de faire valoir les arguments d'un plaignant oralement en vue de déterminer certains faits connus seulement des administrateurs. Les positions se polariseront trop rapidement.

De plus, si un protecteur a un pouvoir de décision, il faudra qu'il y ait des garanties procédurales (qui feront perdre par conséquent beaucoup de temps) pour protéger les fonctionnaires qui risquent d'être affectés par les décisions du protecteur.

Je ne suis pas opposé à un examen judiciaire mais

à l'attribution de pouvoirs judiciaires au protecteur. De fait, si la décision finale doit appartenir aux tribunaux je serais en faveur de donner au Commissaire à l'information le pouvoir de saisir le tribunal pour le compte d'un plaignant, afin que les questions importantes puissent être tranchées en dernier ressort, même si le plaignant n'a pas les moyens d'engager un avocat.

Ainsi que je l'ai déjà mentionné, le projet de loi actuellement déposé au Parlement prévoit un appel devant les tribunaux après qu'un particulier ait demandé l'assistance du Commissaire à l'information ou du Commissaire à la protection de la vie privée, et le commissaire aussi bien que les plaignants auront le droit de saisir les tribunaux. Les affaires qui iront en justice finiront par nous donner un ensemble de précédents qui contribueront à résoudre les plaintes de façon informelle. A mon avis, seul 5 p. 100 des cas dont j'ai eu à connaître justifierait l'intervention de juristes et de tribunaux.

CONCLUSION

Si j'ai appris quelque chose depuis cet appel téléphonique que j'ai reçu en 1977 pour le compte du ministre de la Justice, c'est ceci: la plupart des gens sont en faveur de la liberté de l'information et des droits à l'information personnelle... jusqu'au moment où ils se rendent compte que ces principes risquent de s'appliquer à des informations qu'ils ont préparées.

Il faut du temps pour s'habituer à un renversement complet des principes. Il faut du temps et des efforts pour apprendre à rédiger des rapports objectifs.

Les gens s'inquiètent parce que des informations qui ont été réunies et rédigées bien qu'avant que les droits à l'information ne soient inscrits dans la loi pourront être divulguées. Ces droits à l'information ont un effet rétroactif parce qu'il est difficile de faire en sorte que la date de promulgation de la loi soit une charnière. Si l'information recueillie avant cette date est toujours disponible sur dossier, elle est sujette à divulgation.

Il est intéressant de noter que les services de police et le personnel militaire ont été plus rapides au Canada à s'adapter à la nouvelle législation que les autres ministères. Je dois ajouter que nos institutions pénales ont connu le même cauchemar administratif par suite de nos lois sur la protection de la vie privée qu'aux Etats-Unis. En effet, des demandes de prisonniers n'ont pas eu de suite parce que, ainsi que le département leur répète inlassablement, "le volume des demandes excède la capacité à les traiter".

De nouveaux droits entraînent de nouveaux problèmes. Il est évident que de nombreux défis se poseront aux ombudsmen, aux juristes, aux administrateurs et aux employés, aux sociétés et à leurs clients du fait de l'institutionnalisation des droits

à l'information. Je pense qu'il n'y a pas moyen de revenir en arrière. Je suis en faveur d'une divulgation de l'information aussi complète que possible. Mais je crois également qu'il faut contrebalancer la divulgation avec la protection de la vie privée des autres et avec l'intérêt général et la sécurité de la société dans son ensemble.

Pour terminer, permettez-moi de dire quelques mots tirés de mes sept années d'expérience dans ma charge.

L'idée que je me fais de moi-même n'inclut pas de grand destrier blanc, mes actes ne sont jamais une approbation automatique des décisions gouvernementales. J'essaie de traiter avec un respect égal les plaignants et les bureaucrates. Je me rappelle constamment que je ne dois pas me lancer dans une chasse à la sorcière contre la bureaucratie et ne jamais écarter de plaintes comme étant futiles. Si la plainte était futile, le plaignant ne se donnerait probablement pas toute cette peine. J'essaie de me souvenir que les attributs "frivole" et "vexatoire" sont des notions hautement subjectives.

Oh oui, je sais qu'il existe des plaignants chroniques. Je ne suis pas assez naïf pour l'ignorer. Ils sont, cependant, en nombre très faible. Leurs plaintes méritent également d'être prises en compte. Même un plaignant chronique peut avoir des raisons valides. Si une plainte se révèle sans objet, notre service répond avec fermeté mais douceur.

Les gens vont nous demander: Est-ce que tout cela en vaut bien la peine? Certainement, je réponds, pour celui que nous aidons. Mais aussi, je l'espère, à cause de notre impact indirect sur les pratiques administratives. Si les protecteurs découvrent des erreurs, des oubliés et des abus et peuvent obtenir un redressement, tout le monde s'en porte mieux. Dans mes deux charges je me suis aperçu qu'environ 20 p. 100 des plaintes n'étaient pas justifiées, environ 60 p. 100 tombaient dans la grande catégorie des cas où quelque chose n'avait pas marché et des explications étaient requises, et 20 p. 100 environ étaient des plaintes valides nécessitant des mesures correctives. Je crois savoir que ce sont des pourcentages similaires à ceux que connaissent d'autres ombudsmen. Certains diront, si le pourcentage de plaintes valides est si faible, pourquoi s'en faire? Je répondrai que si le pourcentage est si élevé, le protecteur constitue un garde-fou nécessaire, un moyen de contrôler l'ensemble du système. Si le pourcentage était plus élevé, il y aurait lieu de s'inquiéter. Les protecteurs sont des vérificateurs des systèmes administratifs. Mais nous constatons souvent dans le courant de nos enquêtes que l'insatisfaction vis-à-vis de la bureaucratie ne résulte pas tant du refus de suivre la loi que de communication fautive. Il est facile pour quelqu'un de l'extérieur de découvrir et de rectifier de telles failles de communication. Le service du protecteur communique pour le compte des deux parties.

Lorsqu'un particulier se trouve éconduit par la bureaucratie pour la raison qu'il serait injuste pour la société dans son ensemble de remédier aux torts qui lui sont faits, le protecteur doit écouter très attentivement. Il est, bien entendu, concevable que la société ne puisse pas assurer une justice personnalisée; mais le protecteur doit se demander: est-ce que cette politique est effectivement juste pour toute la société? Quelque chose ne pourrait-il être fait pour rectifier cette difficulté particulière sans détruire tout le système, sans être injuste envers d'autres? Est-ce que la loi est injuste?

Le premier devoir d'un protecteur est de se mettre au service de ceux qui prennent la peine de faire une plainte. Je sais que cela donne lieu à des rapports fragmentaires et à des recommandations qui ne suivent pas une progression très ordonnée. Bien sûr, il est beaucoup plus satisfaisant intellectuellement de formuler de grandes recommandations générales, mais ce n'est pas le travail du protecteur. Je suis convaincu que les protecteurs ne devraient pas s'ériger en conseillers de politique générale du gouvernement, ni en décideurs.. A quoi serviraient les hommes politiques et les administrateurs? A quoi serviraient les commissions royales? Il n'existe pas d'institution autre que le protecteur du citoyen qui puisse dire à un individu: "Vous avez un problème avec l'administration? Bien, j'ai les ressources voulues pour examiner la chose; je vais faire de mon mieux pour que vous soyez traité équitablement... et ma charge est neutre, au service ni de la

bureaucratie ni des hommes politiques".

Faisons tous en sorte que les choses en restent ainsi.



1982 CASHRA ANNUAL CONFERENCE

Notes for Panel Discussion

Data Processing Institute
Professional Development '82
March 18, 1982
Ottawa

Inger Hansen, Q.C.
Privacy Commissioner

Panel: Human Rights Investigations and Access to
Information and Privacy Legislation

Montebello, Quebec
May 31 - June 2, 1982

Have you stolen any personal information lately? Would your lawyer be able to defend you successfully if you had?

The answer to the first question is probably "maybe". The answer to the second question is: your lawyer would probably get you off.

Now if you had used a telecommunication facility without any "colour of right", you might be convicted of having obtained the service.

The reason I say that you might be able to get away with stealing personal information about another is because the Canadian Criminal Code requires that, before you can be convicted of theft, you must fraudulently and without colour of right take something, animate, or inanimate, with the intent of depriving another of his property or interest in it. If you have taken personal information concerning another, you may be charged with and possibly convicted of having stolen the paper or the floppy disc on which the information was recorded. You might get off easily, because the judge would not be able to take into consideration anything but the value of the paper or the floppy disc, perhaps not in excess of two dollars.

Is that right? Is it adequate? Should the judge not be able to take into consideration the possible harm that might accrue because of loss of informational privacy?

Does the possession of information about you represent power in the hands of another? I think so, and I would suggest that anyone who has access to any kind of personal information about you holds some power over you, has some ability to influence you. That person can grant you a promotion, he or she can deny you insurance benefits, he or she can cause you to be fired, can cause you to lose your good credit rating, can nominate you for political office, can target you for marketing of goods or services, can ruin your reputation in the community, can plan to kidnap your children, can forge your cheques, and learn when you are not at home so that your home can safely be broken into, etc., etc. Why then do so many of us give so much information away about ourselves? Why then are so many of us careless with our personal information? Why do we leave it around for strangers to find? Why do we give it to those who may not need it? Why do we care so little whether we are allowed to check the records others keep concerning us? Why do we not, as consumers, insist on knowing what others do with our personal information? Why do we not demand to know in advance

the purposes for which that information is collected, how long it will be kept, whether it will be kept confidential or shared liberally with others? And why do we throw out copies of our credit slips and bank statements without destroying them so that the information they contain may not be recognized? Why do we provide strangers with details about ourselves when they inquire on the telephone or at our door?

I think we should remedy the inadequacy of our laws to protect personal information particularly considering the capacity of electronic information processing.

Let me first say that I do not think computers are bad; I do not think we should stop speedy and accurate methods of processing information. Needless to say, we all give up some privacy in exchange for services. But we must develop new methods to protect ourselves against too much information being collected, against abuse of personal information, against secret and unauthorized use of information. And I do not believe that codification and encryption alone will solve the problem. I do not think we can, nor do I think we should, stop technological progress. Machines speed up processes; machines reduce errors--but machines may also facilitate fraud and minimize our ability to detect such frauds. Machines allow us to provide selective access to data.

Machines are not greedy; machines are not ambitious or devious. Human beings may be, and they invariably deal with the information before it is codified and after. That is why we need laws to restrain abuse of personal information regardless of how that information is processed.

The Federal Government was the first jurisdiction in Canada to enact fair information practices and, for the last four years, it has been my task to see that the government adhered to its own laws which grant "an individual" the right:

- a) to ascertain what records concerning the individual inquiring are used for administrative purposes;
- b) to ascertain the uses to which such information has been put since the proclamation of Part IV which took place on the 1st of March, 1978;
- c) to examine such records or copies thereof, regardless of who provided the information;
- d) to request correction of the personal information; or
- e) to require a notation on the record if the correction is not accepted.

If an individual is dissatisfied with the delivery by any government department or institution of those rights, that

person can lodge a complaint with our office. We will investigate all complaints, and I make findings, public reports and recommendations to the responsible Minister. We hear from over 1,000 persons a year, and approximately 200 complaints are fully investigated each year.

The effect of those rights has been very interesting and beneficial. It may be worthwhile to consider whether some or all of the principles should be extended. My interest in that possibility was heightened when, in February 1980, the Honourable Senator Jacques Flynn, who was then the Minister of Justice, asked me to do a special study into the use of the Social Insurance Number. The study was extended by the Honourable Jean Chrétien, and it took us almost one year to complete it.

The study was designed to examine the extent to which the Social Insurance Number is collected and used, the purpose for which it is used, and whether the number serves as a data linkage device. I was asked to examine possible threats from the use of the number and the implications of regulation or prohibition of the collection and the use of the number. The Ministers' question presented me with a pandora's box! The number was found everywhere; the problem became larger than

the question implied.

I came to the conclusion that the Social Insurance Number is not the real problem. But, secret and inappropriate data-linkage is, and we discovered that many people believed that the Social Insurance Number would provide the key that would allow access to all records about the person behind the number.

If this were so, there would be reason for alarm because total concentration of all information about a person is not desirable and may be dangerous. Access to all information may give the recipient too much power and, if the information ends up in the wrong hands, it may expose the subject of the information to financial, psychological or physical harm.

Data-linkage may be good or bad; undisclosed linkage may even be for the benefit of the individual. But why should it take place without the individual's consent or knowledge; why should it happen without public debate to balance the interests involved?

The danger perceived as arising from the widespread use of the Social Insurance Number is, of course, inherent in all data or

combinations of data that serve to identify an individual. But the reaction to the number is symbolic and it should alert us all to the issue of what kind of data-linkage should be permitted or tolerated. I suggest that data-linkage and use of personal information collected from an individual, in certain transactions clearly defined in law, should take place only after full disclosure of the intended use by the collector and the informed consent of the subject of the information.

Some people value their informational privacy; others are not concerned because, as they say, they have nothing to hide. I would take issue with that attitude because I believe few people would leave their door open to allow a thief an opportunity to enter their homes and the one who steals personal information may cause you a greater loss than the one who takes your bonds and jewels.

The ultimate danger, of course, is something that most Canadians refuse to think about and, if I hadn't lived with it, I wouldn't think about it either. In case of war, terrorism, or occupation by a foreign power, total dossiers on all individuals stored in one place can threaten our civil liberties. I need only mention personal records that indicate race, religion, or political opinions and sexual orientation.

The main recommendation I made as a result of the Social Insurance Number Study was directed towards the unauthorized, secret use of information. The effect of my proposal, if enacted, would be this: a person or institution collecting personal information in exchange for benefits or services would be forced to disclose its proposed uses. Other uses not authorized in law, or disclosed or consented to later would be illegal. The protection would cover information given to another, to governments, to a doctor, to an insurance broker or to a bank, etc.; it would cover disclosure compelled by law (as for example census information); it would cover information stored in home computers.

I proposed the enactment of a new criminal offence to be called an offence against the privacy of another and that it should prohibit the wilful undisclosed acquisition, alteration, use, processing, manipulation, transmission or destruction of personal data, not otherwise authorized by law or by the subject. The prohibition could apply to personal data:

- a) provided to obtain a benefit or service,
- b) provided under compulsion of law, or
- c) placed in the custody of another for storage and the exclusive use of the depositor.

Or to put it otherwise, at time of collection of the information, the intended uses will be discussed, bargained for and agreed to; all other uses, except those specifically authorized by law, would be illegal.

The essential ingredients necessary to prove the suggested offences against the privacy of another would be: the identity of the accused, the provision of the data by the subject, the nature of the transaction (that is, the acquisition, alteration, use, processing, manipulation, transmission, or destruction of the data), the absence of disclosure, consent or authority in law, and finally that the transaction was the wilful act of the accused.

To deal with personal data collected from individuals before the enactment of any offence, it would be necessary to provide that uses not consistent with those implicit in the original purpose for which the data had been provided, be against the law as of the date of enactment of the offence. In other words, consent to uses, not consistent with the original purpose, would have to be obtained from the subject of the information.

Useful parallel concepts do exist, in copyright laws which protect original works, in patent laws which protect proprietary rights in inventions, and in the Criminal Code which creates the

offence of theft of some intangibles, such as of telecommunications time. The proof of the civil wrong or the offence under those laws is difficult, but not impossible. Proof of the offence which I have proposed may be as difficult. However, difficulty of proof does not necessarily mean that an offence cannot be properly defined or successfully prosecuted.

Such an offence would make inappropriate or undesirable data-linkage illegal, regardless of the device used.

The effect would be that individuals would be able to inform themselves and weigh the consequences of giving personal information in return for benefits and services, and they would be able to set conditions appropriate to their specific needs, unless the requirement to give the information was legislated.

Because it is as easy to modify information as it is to appropriate it, and the modification might cause more harm than the simple taking of the data, the proposed offence would make such modification illegal.

There is a saying in business: If it ain't broken, why fix it? I tend to agree, but the offence, if enacted, should be a deterrent to those with access to personal information, whether

they are faced with a casual or accidental opportunity to misuse personal data or are engaged in espionage. The severity of the sanctions for offenders would, of course, vary with the motive of the person who breaks the law. Presumably, the courts would deal with youthful pranksters in a manner analogous to the way they deal with those who engage in "joy-riding", and with deliberate intruders who acquire, sell or use personal data without authority, in the way they deal with people who commit other serious offences against persons or property. Because the possible motives for and the consequences of misuse of data may vary greatly, it will probably be necessary to provide for prosecution both by way of summary proceedings and by indictment.

To prohibit behaviour does not automatically cause it to disappear, and the enactment of the suggested offence would not solve all problems related to the use of the Social Insurance Number or of other personal data. It should increase public awareness of the entitlement of others to some informational privacy and, if the Criminal Code were to provide penalties for certain uses of data, preventive security measures will probably be taken by those who collect, store or use personal data. If there were sanctions in the Criminal Code, it is also possible that the courts would find negligence under common law, or faute under civil law, if reasonable measures were not taken to prevent the commission of a crime.

It is, of course, also possible that those who collect personal data may insist on release clauses to protect against being charged with such an offence. If individuals choose to provide information in spite of a wide-open release clause, the protection would still apply in respect of dishonest acts of persons other than the beneficiary of the release, but a strong consumer lobby would be necessary to ensure a proper balance between private and organizational rights.

The proposal for an offence against the privacy of another has some additional advantages in that it would, if included in the Criminal Code, apply to everyone in both the public and private sectors and to both provincial and federal spheres of authority. It does not interfere with provincial laws, such as, for example, those protecting credit information. If necessary, governments would still be able to establish data commissions to control or protect data and licence collectors of personal data within their respective jurisdictions. In addition, the creation of a criminal offence would employ an established mechanism for enforcement; no new legislation or regulations are required to establish procedures and no new bureaucracy appears necessary. Finally, barring unforeseen new inventions, the offence would still be a workable concept in a cash-less, paper-less society, where individuals carry their own data on their so-called smart card.

But we need more than a new criminal offence; an educational program is necessary to enlist the help of individuals to ensure that their own records are up to date and correct. If records containing personal information are inaccurate or out of date, they are useless and may damage the individual concerned. They may be dangerous. Yet, few people care to check their own records; few seem concerned with the incredible growth in our ability to collect, store, transmit and process information. Few seem concerned with the imminent arrival of the so-called information society where all records are maintained electronically.

Fair information practices in both the public and the private sectors will become essential. The right of access, the right to seek correction and to complain must be provided to the individuals concerned. When the collectors of information know that each individual has the right of access, the collectors act more responsibly and fairly. When the authors of reports know that their reports may not be kept confidential, language becomes cautious, derogatory assessments will be supported by examples or the examples only will be cited, leaving the reader to make up his or her own mind.

In the new information society, everything can be recorded, transmitted and memorized. Nothing disappears with time. What human frailty and laziness provided in the past, laws protecting privacy, and public vigilance, must provide for the future. Information which is electronically recorded can be stored in ever-decreasing spaces. It can be retrieved by any identifier that is part of the data. It can be processed and manipulated in whatever way the programmers can imagine. It can be passed around the globe in five seconds and it need never be destroyed. That is awesome.

The capacity to move away from one's past is disappearing and, for that reason alone, new attitudes and new protective measures in law must create artificially what fires, volume, loss and laziness achieved in respect of paper files. But laws and standards will not come about until there is a strong demand from the public. One can only hope the demand will be there before it is too late. Fair information practices will lead to storage of less information. More accurate and open information must take the place of confidential non-accessible records. Unsubstantiated data, save where the safety of others or society is involved, ought not be stored. The argument that information will become bland as a result must be met with the counter-argument that only in the rarest of

cases should unsubstantiated data be used in the decision-making process that relates to individuals. Only on specified, publicized and exceptional conditions should an individual be denied the right to see records which may profoundly affect his or her life.

I have become a firm believer in fair information practices and laws and in consumer pressure to have them enforced.

Information processing must be subject to control: by the individual concerned, by our governments and by the courts.

I keep telling people to ask the collectors of data:

Do you need to know?

Why do you need to know?

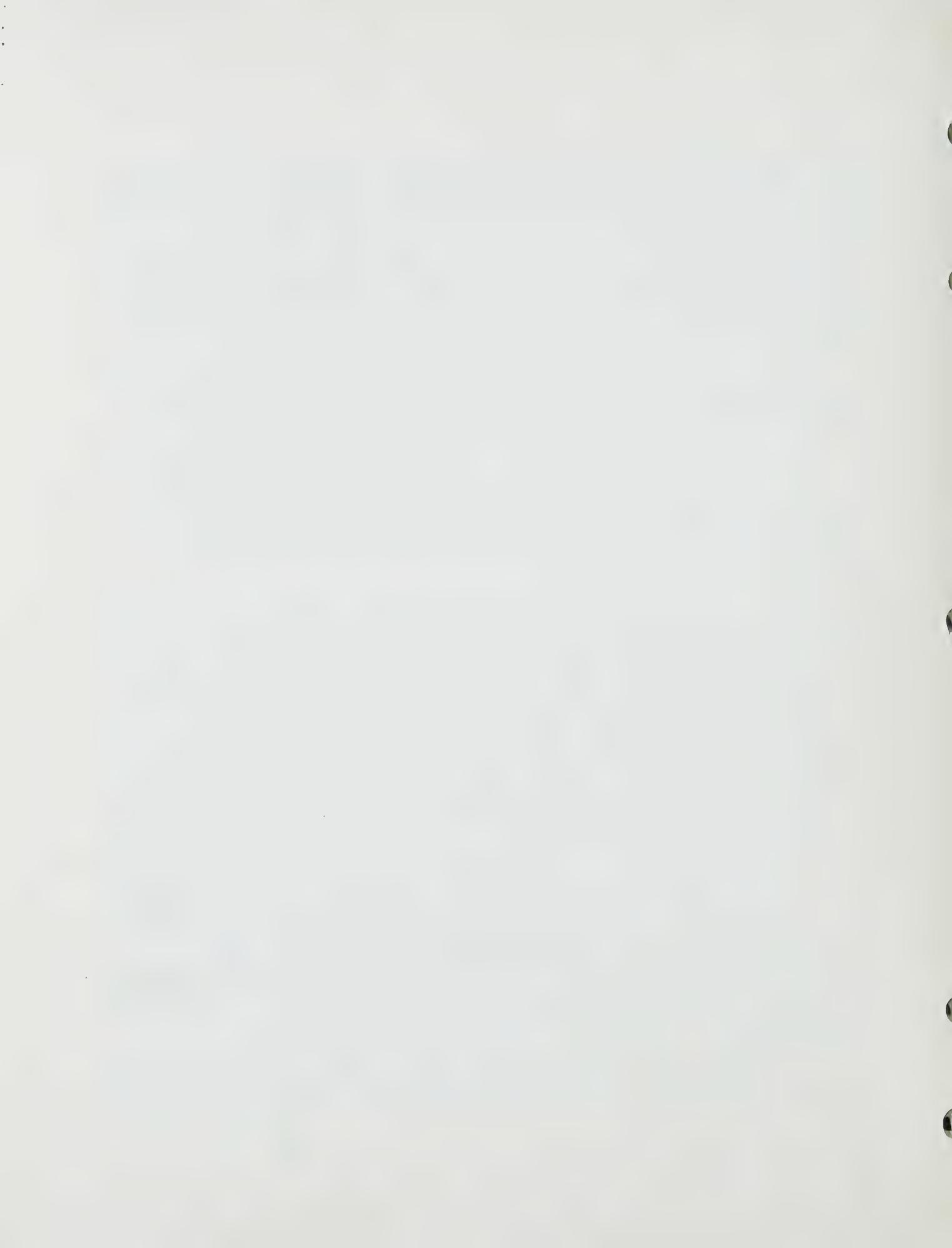
How will you use my personal information?

With whom will you share it?

Will you keep it secure and confidential?

Will you consult me in order to keep it accurate, relevant and up to date?

And I also keep saying: protect your personal data as you would protect your cash, your bonds, your jewellery. The facts you do not wish shared may be worth a lot more than a couple of \$100 bills.



DOCUMENT: 840-224/013



CONFERENCE ANNUELLE 1982 DE L'ACOSPDH

Notes en vue d'un débat

Institut de l'informatique
Perfectionnement professionnel 1982
le 18 mars 1982

Inger Hansen, c.r.
Commissaire à la protection de la vie privée

Débat: Les enquêtes dans le domaine des droits de la personne et les législations en matière d'accès à l'information et de protection de la vie privée

Montebello (Québec)
du 31 mai au 2 juin 1982

Avez-vous volé des renseignements personnels récemment ? Dans l'affirmative, votre avocat pourrait-il vous défendre avec succès ?

Vraisemblablement, la réponse à la première question est "peut-être". Quant à la seconde question, sachez que votre avocat pourrait probablement vous faire acquitter.

Par ailleurs, si vous vous étiez servi d'installations de télécommunication sans la moindre apparence de droit, vous pourriez être déclaré coupable d'avoir profité de ce service.

La raison pour laquelle vous pourriez voler impunément des renseignements personnels concernant autrui, c'est que le Code criminel canadien stipule qu'avant d'être accusée de vol, une personne doit avoir pris frauduleusement et sans apparence de droit une chose quelconque, animée ou non animée, avec l'intention de priver de cette chose une autre personne ayant un droit de propriété ou un intérêt spécial. Si vous vous êtes approprié des renseignements personnels concernant autrui, vous pouvez être accusé et éventuellement déclaré coupable d'avoir volé le papier ou le disque souple sur lequel figuraient les renseignements en question. Vous pourriez cependant vous en tirer facilement, car le juge ne pourrait prendre en considération que la valeur du papier ou du disque, ce qui ne ferait peut-être pas plus de deux dollars.

Est-ce là une façon juste et satisfaisante d'envisager la chose ?
Le juge ne devrait-il pas pouvoir tenir compte du tort susceptib
de découler de la divulgation de renseignements personnels ?

Des renseignements vous concernant confèrent-ils un certain pouvoir
à la personne qui les détient ? Je le crois, et j'ajouterais que
quiconque a accès à des renseignements personnels vous concernant,
possède un certain pouvoir sur vous, est en mesure d'exercer une
certaine influence sur vous. Cette personne peut vous accorder une
promotion, elle peut vous refuser des prestations d'assurance, vous
faire congédier, vous faire perdre votre cote de solvabilité, vous
proposer comme candidat à une fonction politique, vous prendre comme
cible dans le cadre d'une campagne de commercialisation de biens ou
de services, ruiner votre réputation dans la collectivité, planifier
l'enlèvement de vos enfants, falsifier vos chèques, savoir que vous
êtes absent et pénétrer par effraction chez vous, etc., etc. Alors
pourquoi consentons-nous en si grand nombre à donner autant de rensei
gnements sur nous-mêmes ? Pourquoi sommes-nous si peu soucieux de
préserver les renseignements nous concernant ? Pourquoi les laissons
nous à la portée des étrangers ? Pourquoi consentons-nous à les
donner à des personnes qui, peut-être, n'en ont pas besoin ? Pourquoi
nous préoccupons-nous si peu de savoir s'il nous est possible de
vérifier les dossiers que d'autres tiennent à notre sujet ? En tant
que consommateurs, pourquoi n'insistons-nous pas pour savoir ce que

les autres font avec les renseignements qui nous concernent ? Pourquoi n'exigeons-nous pas qu'on nous dise à l'avance à quoi serviront les renseignements recueillis, pendant combien de temps ils seront conservés, s'ils seront gardés secrets ou communiqués libéralement à autrui ? Et pourquoi jetons-nous des copies de nos notes de crédit ou de nos relevés bancaires sans faire en sorte que les renseignements qu'ils contiennent ne puissent être déchiffrés ? Pourquoi donnons-nous des renseignements personnels à des étrangers qui nous téléphonent ou se présentent à notre porte ?

Je crois qu'il nous faudrait remédier aux lacunes de nos lois sur le plan de la protection des renseignements personnels compte tenu surtout des immenses possibilités du traitement électronique de l'information.

Sachez au départ que l'informatisation des données ne me paraît pas une mauvaise chose ; je ne crois pas qu'il faille abandonner des méthodes aussi rapides et aussi exactes de traitement de l'information. Il va sans dire que nous sacrifions une parcelle de notre vie privée en échange de ces services. Nous devons cependant trouver de nouveaux moyens de nous protéger contre la cueillette excessive de renseignements personnels et contre leur utilisation abusive, secrète ou illégale. Je ne crois pas que le codage et le cryptage puissent à eux seuls résoudre le problème. Je ne crois pas que nous puissions enrayer le progrès technologique, ni que nous devrions tenter de le faire. La machine accélère les opérations ; elle réduit le nombre d'erreurs -- mais elle facilite aussi la fraude et minimise notre capacité de la détecter. La machine permet de limiter l'accès aux

données. Elle n'est pas cupide, ambitieuse ou malhonnête. Cependant homme peut l'être, et il a invariablement accès aux renseignements avant et après leur codage. C'est pourquoi il nous faut des lois pour enrayer l'utilisation abusive des renseignements personnels, peu importe la manière dont ces renseignements sont traités.

Le gouvernement fédéral a été la première autorité au Canada à adopter des mesures régissant l'accès à l'information et, au cours des quatre dernières années, j'ai veillé à ce qu'il respecte ses propres lois qui garantissent à "tout individu" le droit :

- a) de savoir quels dossiers le concernant sont utilisés à des fins administratives ;
- b) de vérifier l'usage qui a été fait de ces dossiers depuis l'entrée en vigueur de la partie IV de la Loi canadienne sur les droits de la personne, le 1^{er} mars 1978 ;
- c) d'examiner ces dossiers, ou une copie, qu'il ait ou non fourni lui-même les renseignements qui y sont contenus ;
- d) de demander la correction des dossiers ; et
- e) d'exiger que soit indiqué sur tout dossier l'absence des corrections demandées.

Si une personne croit qu'une institution ou un ministère gouvernemental ne respecte pas ses droits à ce chapitre, elle peut nous présenter

une plainte. Nous faisons enquête sur toutes les plaintes, et je fais des conclusions , des rapports publics et des recommandations à l'intention du ministre responsable. Chaque année, plus de 1000 personnes communiquent avec nous, et nous procédons à l'étude approfondie d'environ 200 cas.

L'adoption de cette loi a eu des effets bénéfiques et très intéressants. Il vaudrait peut-être la peine de se demander s'il n'y aurait pas lieu d'étendre la portée de quelques-uns ou de l'ensemble des principes en question. Mon intérêt à cet égard s'est accru en février 1980, lorsque l'honorable sénateur Jacques Flynn, alors ministre de la Justice, m'a demandé de mener une étude spéciale sur l'utilisation du numéro d'assurance sociale. L'honorable Jean Chrétien a fait reporter la date limite de cette étude, que nous avons mis presque une année à parachever.

Le but de cette étude était de déterminer dans quelle mesure on se procure et utilise le numéro d'assurance sociale, à quelles fins il est utilisé et s'il sert à relier les données. J'étais également tenue d'examiner quelles menaces, le cas échéant, l'utilisation du numéro d'assurance sociale représente pour la vie privée des individus, les répercussions de la possibilité de réglementer ou d'interdire l'obtention et l'utilisation du numéro. Cette requête des ministres me fit découvrir une sorte de boîte de Pandore! On retrouvait le numéro partout ; le problème était donc bien

plus vaste que ne le laissait entendre la requête.

J'en suis arrivée à la conclusion que le véritable problème n'est pas le numéro d'assurance sociale, mais bien l'utilisation secrète et inappropriée du couplage des données. En outre, nous avons découvert que, pour bien des gens, le numéro d'assurance sociale est la clé qui permet d'accéder à tous les dossiers concernant le détenteur.

Si tel était le cas, nous aurions raison de nous inquiéter car il n'est pas souhaitable de regrouper absolument tous les renseignements concernant une personne. Cela peut aussi être dangereux. Il est possible que l'accès à tous ces renseignements confère un trop grand pouvoir, sans compter que certains pourraient en profiter pour causer du tort à l'intéressé au point de vue financier, psychologique ou physique.

Le couplage des données peut être une bonne ou une mauvaise chose; le couplage non divulgué peut même être à l'avantage de l'intéressé. Mais pourquoi ne pas aviser celui-ci ou obtenir son consentement; pourquoi ne pas en discuter publiquement pour déterminer le pour et le contre?

L'utilisation répandue du numéro d'assurance sociale comporte un danger qui, évidemment, est inhérent à toutes les données ou

combinaisons de données servant à identifier une personne.

Mais la réaction du public à cet égard est symbolique et doit nous faire réfléchir à la question de savoir quel genre de couplage des données devrait être permis ou toléré. Je suggère que le couplage des données et l'utilisation des renseignements personnels fournis par une personne ne soit permis, dans certaines limites clairement définies par la loi, qu'après que celui qui recueille ces renseignements ait indiqué à quelles fins il entend les utiliser et ait obtenu le consentement bien informé de la personne en question.

Certaines personnes attachent une grande importance à la protection des renseignements qui leur sont personnels ; d'autres n'y attachent aucune importance parce qu'elles croient n'avoir rien à cacher. Je me permets de ne pas partager leur avis là-dessus car je crois que bien peu de gens laisseraient leur porte ouverte pour permettre à un voleur d'entrer chez eux. Or, une personne qui vous vole des renseignements personnels peut vous causer plus de tort qu'une autre qui s'empare de vos titres et de vos bijoux.

Évidemment, la plupart des Canadiens refusent de penser au danger ultime que cela implique, et je n'y penserais pas non plus si je n'avais pas dû étudier la question de près. En cas de guerre, d'actes de terrorisme ou d'occupation du pays par une puissance étrangère, l'existence, en un seul endroit, de dossiers complets sur tous les individus pourrait constituer une menace pour nos libertés civiles. Qu'il me suffise de mentionner les dossiers personnels où sont indiqués la race, la religion, ou les opinions politiques et l'orientation sexuelle de chacun.

La principale recommandation que j'ai formulée dans le rapport sur l'utilisation du numéro d'assurance sociale avait trait à l'utilisation secrète et non autorisé des renseignements. Si cette proposition était retenue, les personnes et les institutions qui recueillent des renseignements personnels en retour de services ou d'avantages seraient tenues de faire connaître l'usage qu'ils entendent en faire. D'autres usages non autorisés légalement, ou divulgués ou permis après coup, seraient illégaux. Cette protection s'étendrait aux renseignements fournis à une autre personne, aux gouvernements, à un médecin, à un courtier d'assurance ou à une banque, etc. ; elle s'appliquerait également aux renseignements que la loi nous oblige à fournir (par exemple, à des fins de recensement), ainsi qu'à ceux qui sont emmagasinés dans les ordinateurs de particuliers.

J'ai proposé d'ajouter une disposition au Code criminel qui prévoirait une nouvelle infraction appelée infraction contre la vie privée d'autrui et qui interdirait l'action délibérée et non divulguée d'acquérir, d'altérer, d'utiliser, de traiter, de manipuler, de transmettre ou de détruire les données personnelles, sans autorisation accordée par ailleurs en vertu d'une loi ou par la personne en question. L'interdiction s'appliquerait aux données personnelles :

- a) fournies pour obtenir un avantage ou un service,
- b) fournies sous la contrainte de la loi, ou
- c) confiées à autrui pour conservation et usage exclusif.

En d'autres termes, au moment de la collecte des données, l'utilisation qu'on prévoit en faire serait étudiée, négociée et approuvée toute autre utilisation, à l'exception de celles prévues explicitement par la loi, serait illégale.

Les éléments essentiels et nécessaires pour prouver l'infraction évoquée contre la vie privée d'autrui seraient l'identité de l'accusé, la remise des données par le sujet, la nature de la transaction (c'est-à-dire l'acquisition, l'altération, l'emploi, le traitement, la manipulation, la transmission, ou la destruction des données), l'absence de divulgation, le consentement ou l'autorisation accordée par la loi, et finalement le fait que la transaction a été un acte volontaire de l'accusé.

Pour statuer dans le cas des données obtenues d'individus avant qu'une disposition de la loi précise une infraction, il faudrait disposer que les emplois incompatibles avec l'usage implicitement prévu dans l'objet de la collecte des données sont contre la loi à partir du moment où l'infraction y est mentionnée. Autrement dit, il faudrait obtenir du sujet visé par les informations le consentement aux emplois incompatibles avec le but original de la collecte des données.

Il se trouve des notions parallèles qui sont utiles, dans les lois sur les droits d'auteur qui protègent les œuvres originales, dans les lois sur les brevets qui protègent les droits de propriété des inventions, et dans le Code criminel qui crée l'infraction de

vol d'intangibles comme les heures de télécommunications. La preuve du délit ou du tort civil aux termes de ces lois est difficile, mais non impossible. La preuve de l'infraction envisagée ici peut être aussi difficile. Toutefois, la difficulté d'une preuve ne veut pas nécessairement dire qu'une infraction ne peut pas être définie avec la précision voulue ni donner lieu à des poursuites qui aboutissent.

Si une telle infraction était prévue, le couplage inapproprié ou indésirable des données serait frappé d'illégalité, peu importe le moyen employé.

Les individus pourraient s'informer et peser les conséquences du fait de donner des renseignements personnels en retour d'avantages et de services. Ils seraient également en mesure de fixer des modalités conformes à leurs besoins particuliers, à moins que l'obligation de donner les renseignements n'ait été prescrite par la loi.

Parce qu'il est aussi facile de modifier l'information que de se l'approprier, et que la modification pourrait causer plus de tort que le simple fait de prendre les données, l'infraction proposée frapperait d'illégalité une pareille modification.

"Pourquoi réparer ce qui fonctionne encore?", dirait-on en affaires. Je suis un peu de cet avis, mais il demeure que le fait de prévoir l'infraction aurait un effet dissuasif sur les responsables de la

collecte des renseignements personnels, lorsqu'ils ont par chance ou accident l'occasion d'abuser des données personnelles ou s'ils se livrent à l'espionnage. Bien entendu, la sévérité des sanctions qui attendraient les contrevenants varierait selon leurs mobiles. Selon toute vraisemblance, les tribunaux traiteraient les jeunes auteurs de fredaines un peu comme ils traitent ceux qui se balladent dans une auto à l'insu du propriétaire ; dans le cas d'intrusion délibérée qui comporte l'acquisition, la vente ou l'utilisation de données personnelles sans autorisation, ils se prononceraient comme à l'égard d'autres graves atteintes aux personnes ou aux biens. Comme les mobiles possibles et les conséquences de l'abus des données peuvent varier grandement, il faudra probablement prévoir des poursuites par voie de procédure sommaire ou de mise en accusation.

Interdire un comportement ne le fait pas disparaître automatiquement et le fait de prévoir dans la loi l'infraction envisagée ne résoudrait pas tous les problèmes relatifs à l'utilisation du NAS ou d'autres données personnelles. Le public serait plus sensible au droit d'autrui à une certaine protection des renseignements personnels et, si le Code criminel prévoyait des peines pour certains emplois des données, des mesures de sécurité préventive seraient probablement prises par ceux qui recueillent, conservent ou utilisent des données personnelles. Si le Code criminel prévoyait des sanctions, il est possible aussi que les tribunaux rendent un verdict de négligence en vertu du droit coutumier, ou un verdict de faute aux termes du droit civil, si des mesures raisonnables n'étaient pas prises pour prévenir un crime.

Bien entendu, il est possible aussi que les personnes colligeant des données personnelles insistent sur des clauses d'abandon des droits en vue de ne pas être accusées d'une telle infraction. Si des individus décidaient de fournir des informations nonobstant une clause d'abandon global des droits, la protection jouerait encore à l'égard d'actes malhonnêtes de personnes autres que le bénéficiaire de l'abandon, mais il faudrait de fortes pressions des consommateurs pour assurer un bon équilibre entre les droits de l'individu et les droits d'une organisation.

La proposition qui prévoit une infraction contre la vie privée d'autrui a d'autres avantages, car, advenant son adoption, elle s'appliquerait aux secteurs public et privé, et aux deux sphères d'autorité fédérale et provinciale. Elle n'entrave pas l'application des lois provinciales comme par exemple celles qui protègent les renseignements sur la solvabilité. Au besoin, les gouvernements seraient encore en mesure de mettre sur pied des commissions chargées de contrôler ou de protéger les données et d'accorder des permis aux cueilleurs de données personnelles de leur ressort respectif. En outre, la création d'une infraction criminelle permettrait d'employer un mécanisme établi d'exécution de la loi ; il n'est pas nécessaire d'adopter de nouvelles mesures législatives ou de nouveaux règlements pour prescrire des formalités à remplir, et aucune bureaucratie nouvelle ne semble nécessaire. Enfin, à moins de nouvelles inventions imprévues, l'infraction à créer serait encore une notion pratique dans une société sans numéraire ni papier où les individus portent leurs propres données sur leur carte dite intelligente.

La création d'une nouvelle infraction criminelle ne suffit cependant pas. Nous avons besoin d'un programme de sensibilisation afin d'inciter les individus à faire en sorte que les dossiers portant leurs propres renseignements personnels soient bien à jour et exacts. Sinon, ils sont inutiles et peuvent leur nuire et être dangereux. Pourtant, rares sont ceux qui prennent la peine de vérifier leurs propres dossiers ; très peu s'inquiètent de l'essor incroyable de notre capacité de colliger, de stocker, de transmettre et de traiter des données. Seule une minorité semble s'inquiéter de l'arrivée imminente de la société dite de l'information où tous les dossiers seront informatisés.

Il faudra absolument pouvoir compter sur des mesures régissant l'information dans les secteurs public et privé. Le droit des intéressés de consulter les dossiers les concernant, d'exiger qu'on y apporte des corrections et de porter plainte à ce sujet devra être reconnu. Lorsque les préposés à la cueillette des renseignements savent que chaque individu a le droit de consulter son dossier, ils agissent d'une manière plus responsable et plus juste. En sachant que la confidentialité d'un rapport n'est pas assurée, son auteur écrit avec plus de prudence, appuie ses critiques par des exemples, ou encore ne fait que donner les exemples en laissant au lecteur le soin de se faire une idée.

Dans la nouvelle société de l'information, tout peut être enregistré, transmis et mémorisé sans que le temps n'efface rien. Les lois protégeant la vie privée, et la vigilance publique, devront assurer à l'avenir ce que la faiblesse et la paresse humaines assuraient par le passé. L'information automatisée peut être stockée dans des espaces de plus en plus restreints. On peut l'extraire au moyen de tout identifiant faisant partie des données. L'information peut être traitée et manipulée de toutes les façons que les programmeurs peuvent imaginer. Elle peut faire le tour du globe en cinq secondes et peut être conservée indéfiniment. De quoi vous faire dresser les cheveux sur la tête.

On peut de moins en moins cacher son passé et, pour cette seule raison, de nouvelles attitudes et de nouvelles mesures de protection juridique doivent créer artificiellement ce que l'incendie, le volume, la perte et la paresse ont accompli pour la paperasse. Mais il ne sera adopté de lois et de normes en cette matière que lorsque le grand public en aura clairement fait la demande. Espérons que cette demande sera formulée avant qu'il ne soit trop tard. Des mesures régissant l'accès à l'information réduiront le stockage de données. Aux dossiers confidentiels et non accessibles doivent se substituer des dossiers plus exacts et plus faciles à consulter. Sauf dans les cas où la sécurité d'autrui ou de la société entre en jeu, on ne devrait pas stocker de

données non corroborées. À ceux qui craignent l'affadissement de l'information, il faut répondre que le recours à des données non corroborées ne devrait avoir lieu que d'une manière tout à fait exceptionnelle pour prendre des décisions qui touchent les individus. Sauf dans des situations précises, connues et exceptionnelles, toute personne devrait pouvoir consulter librement les dossiers susceptibles d'influer profondément sur sa vie.

J'en suis venue à croire fermement à la nécessité de lois et de justes méthodes d'accès à l'information et de pressions de la part des consommateurs pour obtenir leur mise en application.

Le traitement des renseignements doit être assujetti au contrôle de la personne concernée, de nos gouvernements et des tribunaux.

Je répète constamment que nous devons demander à ceux qui colligent des données :

Avez-vous besoin de ces renseignements ?

Pourquoi ?

Quel usage en ferez-vous ?

Avec qui les partagerez-vous ?

Allez-vous prendre des mesures pour assurer leur sécurité et faire en sorte qu'ils restent confidentiels ?

Allez-vous me consulter pour qu'ils restent à jour, exacts et pertinents ?

Et j'ajoute : protégez vos données personnelles comme s'il s'agissait de votre argent, de vos valeurs, de vos bijoux. L'information que vous ne désirez pas confier peut valoir beaucoup plus que quelques centaines de dollars.



1982 CASHRA ANNUAL CONFERENCE

CONFERENCE ANNUELLE 1982 DE L'ACOSPDH

(EXTRACT)

(EXTRAIT)

Minutes of Proceedings and
Evidence of the Special Joint
Committee of the Senate and of
the House of Commons on the
Constitution of Canada

Procès-verbal et témoignages
du Comité mixte spécial du
Sénat et de la Chambre des
communes sur la Constitution
du Canada

Friday, November 21, 1980

Le vendredi 21 novembre 1980

Panel

Section 15 of the Charter:
Mental Disability

Débat

Article 15 de la Charte:
Handicap mental

Montebello, Quebec
May 31 - June 2, 1982

Montebello (Québec)
du 31 mai au 2 juin 1982

(EXTRACT)

SENATE
HOUSE OF COMMONS

Issue No. 10

Friday, November 21, 1980

Joint Chairmen:

Senator Harry Hays
Serge Joyal, M.P.

*Minutes of Proceedings and Evidence
of the Special Joint Committee of
the Senate and of
the House of Commons on the*

Constitution of Canada

RESPECTING:

The document entitled "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" published by the Government on October 2, 1980

(EXTRAIT)

SÉNAT
CHAMBRE DES COMMUNES

Fascicule n° 10

Le vendredi 21 novembre 1980

Coprésidents:

Sénateur Harry Hays
Serge Joyal, député

*Procès-verbaux et témoignages
du Comité mixte spécial
du Sénat et de
la Chambre des communes sur la*

Constitution du Canada

CONCERNANT:

Le document intitulé «Projet de résolution portant adresse commune à Sa Majesté la Reine concernant la Constitution du Canada», publié par le gouvernement le 2 octobre 1980

WITNESSES:

(See back cover)

TÉMOINS:

(Voir à l'endos)

First Session of the
Thirty-second Parliament, 1980

Première session de la
trente-deuxième législature, 1980

[Text]

groups to increase that hour, the exception being this morning, to accommodate travel arrangements.

Secondly, we are reducing that first round to ten minutes.

Thirdly, the matter of time for additional rounds was left open. Mr. Nystrom asked to discuss that with colleagues. I made the same request and I think that we have agreement up to the last point at the moment.

The Joint Chairman (Mr. Joyal): That is what I understood from our meeting last night, and that is essentially what I have just reported to the honourable members of this Committee.

The suggestion that you are putting forward, I interpreted it as a suggestion presently put forward by Mr. Nystrom, I think that according to our rules we should defer it to the steering committee and the agenda and report after a later meeting if you agree. Mr. Nystrom.

It is my pleasure this morning to introduce—de présenter, au nom de l'Association canadienne pour les Déficients mentaux, Canadian Association for the Mentally Retarded, monsieur Paul Mercure, président, et monsieur David Vickers, vice-président.

Je crois comprendre que l'Association a déjà fait parvenir au greffier de ce Comité qui a bien voulu le faire distribuer, un mémoire. Je crois comprendre également que vous pourrez faire une courte présentation et ensuite répondre aux questions que les honorables membres voudront bien vous poser.

Je vois également, à la table des témoins, un autre de vos collègues, je crois, qui vous accompagne et par conséquent je demanderais au président, monsieur Mercure, de bien vouloir nous le présenter.

Monsieur Mercure.

M. Paul Mercure (président de l'Association canadienne pour les déficients mentaux): Je désire, monsieur le président, en premier lieu, remercier chacun des membres du Comité des deux Chambres d'avoir accordé aux représentants de l'Association canadienne pour les Déficients mentaux quelques minutes de leur précieux temps malgré des échéances très contraignantes.

Notre délégation comprend, à ma gauche, monsieur Dave Vickers, père d'une jeune déficiente, vice-président de notre Association et ex-sous-ministre de la Justice en Colombie-Britannique et à ma droite, monsieur David Lincoln, président d'un groupe, «People First», à Fort Erie en Ontario. Il s'agit d'un groupe de personnes déficientes adultes qui se prennent en main. Quelques autres personnes nous accompagnent dont monsieur Harvey Endicott qui est le coordonnateur des services et ressources juridiques de l'Association nationale.

L'Association canadienne pour les Déficients mentaux a pour but de défendre les droits et de promouvoir les intérêts des quelque 500,000 Canadiens vivant avec un handicap mental.

Ce mouvement bénévole de citoyens s'appuie sur des associations provinciales dans chacune des provinces et sur quelque 40,000 membres qui sont répartis dans près de 400 associations locales. Il y aurait donc lieu de corriger le résumé qui a été donné. C'est 40,000 membres que nous avons à travers le Canada.

[Translation]

avoir plus. Les témoins de ce matin ne seront pas touchés, car ils ont pris des arrangements pour rentrer chez eux.

Ensuite, les interventions au premier tour seront réduites à 10 minutes.

Enfin, nous n'avons pas encore décidé du temps qui sera alloué pour les tours suivants. M. Nystrom et moi avons demandé d'en parler aux membres de nos partis respectifs. Nous sommes donc d'accord sur les deux premiers points, mais non sur le troisième.

Le coprésident (M. Joyal): C'est à peu près ce que je viens de dire.

Si vous voulez, monsieur Nystrom, je renverrai la question au sous-comité, qui nous en fera rapport.

J'ai le plaisir de vous présenter ce matin Mr. Paul Mercure, President of the Canadian Association for the Mentally Retarded, and Mr. David Vickers, Vice-President.

I understand that the Association has submitted a brief to the clerk of the committee and that it has been distributed. I also understand that you have a short presentation to make before answering the members' questions.

I see that you have another colleague with you at the table and I would ask the President, Mr. Mercure, to introduce him.

Mr. Mercure.

Mr. Paul Mercure (President of the Canadian Association for the Mentally Retarded): I would first like to thank the members of the joint committee for having given the representatives of the Canadian Association for the Mentally Retarded a few minutes of their precious time, despite the deadlines they are facing.

Our delegation includes, on my left, Mr. Dave Vickers, Vice-President of our association and a former deputy minister of Justice in British Columbia, whose young daughter is mentally retarded, and, on my right, Mr. David Lincoln, President of the People First group, which is based in Fort Erie, Ontario. This is a group of mentally retarded adults who are trying to get along on their own. Mr. Harvey Endicott, Co-ordinator of the Association's legal services and resources, is also with us.

The purpose of the Canadian Association for the Mentally Retarded is to defend the rights and promote the interests of some 500,000 mentally handicapped Canadians.

It is a voluntary movement that includes provincial associations and some 40,000 members belonging to almost 400 local associations. Our brief should thus be corrected. We have 40,000 members throughout Canada.

[Texte]

Dans ses principales démarches, elle entend faire respecter les droits de toutes les personnes vivant avec un handicap, qu'il soit physique ou mental, parce que nous faisons cause commune avec d'autres groupes représentant d'autres personnes handicapées.

C'est notre conviction profonde, comme Association, que tous les déficients mentaux doivent vivre dans la société loin du cadre institutionnel aliénant. Ce processus d'intégration sociale est bien enclenchée dans toutes les parties du Canada et devra se poursuivre pendant de nombreuses années. C'est ce fait que les personnes déficientes vivent de plus en plus dans la société qui rend impérative la protection de leurs droits à ce moment-ci.

Déjà, en grande partie, dû au travail de notre mouvement, plusieurs lois, tant provinciales que fédérales, s'adressent à ces questions. Notre propos ce matin se situe dans le cadre de décisions prises par notre assemblée générale qui a été tenue à Toronto en juin dernier et d'assemblées générales antérieures qui ont pris position sur les droits des personnes handicapées. L'assemblée de juin a demandé que l'Association fasse la promotion de l'enchâssement de ces droits dans une nouvelle Constitution canadienne.

Ces démarches ont résulté en un mémoire spécial présenté au comité spécial de la Chambre des communes sur les Invalides et les Déficients.

Je désirerais maintenant souligner que nous sommes heureux du travail que nous avons, je crois, réussi à accomplir au niveau de ce comité parce que l'essentiel de ce que nous voulons dire ce matin est mentionné dans le préambule du document qui est sorti très récemment, en octobre, et qui est du comité spécial concernant les Invalides et Handicapés, qui est un comité des Communes.

Le texte sur lequel je voudrais insister c'est le troisième paragraphe du préambule qui dit:

Si le Parlement décide d'enchâsser les droits de la personne dans une Constitution rapatriée, le comité est d'avis qu'une protection complète et égale devrait être assurée aux personnes souffrant de handicaps physiques et mentaux.

Nous demandons que les droits des personnes handicapées soient donc protégés dans la nouvelle Constitution.

Notre Association n'a pas pris position sur la façon de rapatrier la Constitution, non pas que nous n'ayons pas d'opinion personnelle, mais des personnes plus compétentes que peuvent traiter de cette question.

Ce que nous désirons, c'est que la Constitution, une fois rapatriée, traite des droits positifs de tous les Canadiens et accorde une protection particulière aux personnes handicapées parce que cela est actuellement nécessaire à l'exercice de leurs droits.

Nous ne demandons aucun droit spécial, pas plus d'ailleurs que nous sommes favorables aux services spéciaux et ségrégés que nous cherchons à remplacer partout au Canada par des services intégrés dans la société.

[Traduction]

The Association's main goal is to ensure that the rights of physically and mentally handicapped persons are respected and we have joined forces with other groups representing the handicapped.

Our Association is deeply convinced that all mentally handicapped people should live in society, outside of institutions which tend to alienate them. The integration process has begun throughout Canada and should be pursued on a long-term basis. Because more and more handicapped people are living in society, their rights must be protected.

Thanks to the efforts of our movement, a number of provincial and federal laws have addressed these questions. Our remarks this morning are based on decisions made at our general meeting, held in Toronto last June, and on previous general meetings which took a stand on the rights of the handicapped. At the June meeting, the Association was asked to promote the enshrinement of these rights in the new Canadian constitution.

This resulted in a special brief being presented to the special committee of the House of Commons on the handicapped and the disabled.

I would like to take this opportunity to say that I am happy with what we were able to accomplish with respect to that committee. Most of what we want to say this morning is contained in the preamble to a document published in October by the Special Committee on the Handicapped and the Disabled.

I would like to quote the third paragraph of the preamble, which reads as follows:

If Parliament decides to enshrine human rights in the patriated constitution, the committee feels that complete and equal protection should be extended to persons suffering from physical and mental handicaps.

We are asking that the rights of handicapped persons be protected in the new constitution.

The Association has not taken up position on how to patriate the constitution. We, of course, have our personal opinions, but we would rather the matter be dealt with by persons more qualified than us.

We want the patriated constitution to deal with the rights of all Canadians and give added protection to handicapped persons, who need it to be able to exercise their rights.

We are not asking for special rights, any more than we are in favour of special or segregated services, which we would like to see replaced, throughout Canada, by integrated services.

[Text]

Pour tous, nous demandons une place dans la société et pour les personnes handicapées, la protection légale nécessaire à l'exercice des droits dont jouissent les autres Canadiens.

Avant de demander à monsieur Vickers d'exposer nos demandes d'une façon très spécifique, j'aimerais que monsieur David Lincoln qui est président d'un groupe de personnes déficientes à Fort Erie, comme je le disais tout à l'heure, nous donne quelques exemples concrets de ce que les intéressés eux-mêmes vivent quotidiennement.

The Joint Chairman (Mr. Joyal): Mr. Lincoln.

Mr. David Lincoln (President, People First): First of all, I would like to say that People First is a self-advocacy group of mentally retarded persons helping each other.

I have a few examples here, like needing more funding for shelter workshops, more staff and better pay for handicapped people.

One incident that comes to mind is from Carleton Place where clients were getting 2 cents an hour for the work they were doing. We feel that we are accomplishing a lot by working and human rights should cover minimum wage for all handicapped, or humans, supposedly.

Another one is there should be more low-rental accommodation for handicapped persons and if they move into a place they should not be discriminated against because they are retarded. Most people would rather turn them down because they are mentally retarded, and they figure it would be a low cut in rent, but it is not happening.

The best part of all, we are Canadian citizens; we feel we should be a part of the Canadian citizens instead of feeling second class.

The reason we are called People First is it is very important for our rights to such opportunities to be protected in the Canadian constitution. Please do not ignore us. We are people who are Canadian citizens first and handicapped second.

The Joint Chairman (Senator Hays): Thank you very much. Mr. Lincoln.

Mr. Vickers?

Mr. David Vickers (Vice-President, Canadian Association for the Mentally Retarded): Mr. Chairman and Members of the Committee, we are here this morning to discuss with you a question of values. We are speaking of the value that will be placed upon the lives of our sons and daughters.

We are speaking to you about the value that will be placed upon the lives of thousands of Canadian citizens; these Canadian citizens living with a handicap, whether real or perceived.

Our plea to you is not a plea for special rights. Our plea as advocates of people with a handicap is that they too will be afforded the full opportunity that attaches to their Canadian citizenship; in short, a plea that they will not be forgotten in

[Translation]

What we are asking for is a place in society and the legal protection that handicapped people need to be able to exercise the same rights as other Canadians.

Before asking Mr. Vickers to give a more detailed account of our demands, I would like Mr. David Lincoln, who, as I said, is President of a group of mentally retarded people based in Fort Erie, to provide specific examples of situations that the group members have to deal with every day.

Le coprésident (M. Joyal): Monsieur Lincoln.

Mr. David Lincoln (président, People First): Pour commencer, je précise que People First est un groupe d'entre-aide de déficients mentaux.

J'ai ici quelques exemples. Certains groupes ont besoin de financement pour leurs ateliers, pour pouvoir engager plus de personnel et mieux payer les handicapés qui y travaillent.

Je pense en particulier au cas de Carleton Place où certains de nos clients sont payés deux cents de l'heure pour leur travail. Nous pensons accomplir une tâche très utile, et le moins qu'on puisse faire dans le cadre de la défense des droits de l'homme, c'est de payer un salaire minimum à tous les handicapés, qui sont des êtres humains, ou qui sont censés l'être.

En outre, les handicapés ont besoin de logements à loyer modique et ne doivent pas faire l'objet de discrimination du simple fait de leur état. Très souvent, le premier mouvement est de leur refuser un logement; il y a également des considérations de loyer.

Le plus important, c'est que nous sommes des citoyens canadiens et que nous devrions avoir le sentiment de faire partie de la communauté canadienne et ne pas nous sentir des citoyens de seconde classe.

Le nom de notre organisation, People First est très important, et il est important également que nos droits soient protégés dans la constitution canadienne. Nous vous supplions de ne pas nous ignorer. Nous sommes des êtres humains et nous sommes citoyens canadiens avant d'être handicapés.

Le coprésident (sénateur Hays): Merci beaucoup, monsieur Lincoln.

Monsieur Vickers?

Mr. David Vickers (vice-président, Association canadienne pour les déficients mentaux): Monsieur le président, messieurs les membres du Comité, nous sommes ici ce matin pour discuter avec vous d'une question de valeurs. Nous allons vous parler de la valeur qu'on va accorder à l'existence de nos fils et de nos filles.

Nous allons vous parler de la valeur que l'on accordera à l'existence de milliers de citoyens canadiens, ces citoyens canadiens qui souffrent d'un handicap, réel ou perçu.

Nous ne venons pas vous demander des droits particuliers. Si nous défendons les gens qui ont un handicap, c'est pour réclamer pour eux tous les droits dont ils devraient jouir en tant que citoyens canadiens. Autrement dit, nous venons vous

[Texte]

the new Bill of Rights so that they may become, as David has just said, Canadians first and handicapped second.

We ask you to pause for a moment, if you will, to consider the needs of an average Canadian citizen. Think of your own needs and how they have been met throughout your life. Canadians who are handicapped are no different in that regard than you or I. To achieve the limits of their potential they require, first of all, the ability to live, and in particular adequate health care.

Second, they require an appropriate education in the least restrictive alternative.

Third, they need appropriate vocational training and thereafter appropriate vocational opportunities.

Fourth, they need appropriate residential accommodation, again in the least restrictive alternative.

Fifth, they need appropriate recreational and social opportunities.

Antidiscrimination clauses in charters and human rights codes contains statements of conduct that is prohibitive. In addition to such statements of prohibitive conduct, our association favours a statement of positive rights. We say that those values to which we all subscribe as Canadians can be and ought to be stated as basic conditions of social, economic and cultural rights in Canada.

Unfortunately time has not allowed us to conduct an exhaustive study in that regard. In the preparation of our brief we have strived to return to the basic question, what are those values to which we can subscribe and how can they be entrenched in a charter of rights within the Canadian constitution?

Therefore we had reference to the International Covenants Board on Human Rights. These United Nations Covenants have been subscribed to by Canada and the provinces.

We are told that the ratification of these covenants, the appointment of a Canadian representative to the Human Rights Committee and the subsequent ratification of the optional protocol remain today as a shining example of federal-provincial co-operation.

Therefore, since August 19, 1976 when the document came into effect, we have had a set of international values to which we could refer when considering the very issues which are before us today.

The first of these covenants deals with economic, social and cultural rights, the second with civil and political rights. Our list which was taken from these covenants is found at page 2 of our brief.

From the second covenant, Article 6 and the first covenant, Article 12, we have extracted the right to life and the right to health care. The remainder are all taken from the first covenant and include Article 11, the right to adequate food, clothing and housing; Article 10, the right to protection and assistance of the family; Article 13, the right to an appropriate

[Traduction]

demander de ne pas les oublier dans la nouvelle déclaration des droits, pour qu'ils puissent devenir, comme David vient de le dire, des Canadiens d'abord, des handicapés ensuite.

Nous vous demandons de réfléchir un instant aux besoins d'un Canadien moyen. Pensez à vos propres besoins et à la façon dont ils ont été satisfaits au cours de votre vie. A cet égard, les handicapés ne sont en rien différents de vous ou de moi. Pour réaliser leur potentiel, ils ont besoin tout d'abord de pouvoir exister et ils ont besoin en particulier de soins médicaux suffisants.

En second lieu, il leur faut une bonne instruction, avec le moins de restrictions possible.

Troisièmement, il leur faut une bonne formation professionnelle, puis la possibilité d'exercer ce potentiel professionnel.

Quatrièmement, ils ont besoin d'un logement adéquat, également avec le moins de restrictions possible.

Cinquièmement, ils ont besoin d'activités récréatives et sociales.

Les chartes et les codes sur les droits de l'homme contiennent des clauses anti-discriminatoires, des normes de conduite prohibitives. En plus de ces normes négatives, notre Association voudrait que l'on adopte des normes positives. Nous prétendons que les valeurs que nous défendons tous en tant que Canadiens devraient figurer dans la charte comme une condition fondamentale des droits sociaux, économiques et culturels au Canada.

Malheureusement, le temps ne nous a pas permis de faire une étude exhaustive dans ce sens. En préparant notre mémoire, nous avons essayé de nous en tenir à la question fondamentale de savoir quelles étaient ces valeurs que nous voulons défendre et comment nous pouvons les inscrire dans une charte des droits, elle-même enchaînée dans la constitution canadienne.

Par conséquent, nous nous sommes référés aux pactes internationaux sur les droits de l'homme. Ces pactes, conclus sous l'égide des Nations unies, ont été signés par le Canada et par les provinces.

On nous dit que la ratification de ces pactes, la nomination d'un représentant canadien au Comité des droits de l'homme et la ratification subséquente du protocole facultatif restent une manifestation exemplaire de coopération fédérale-provinciale.

Par conséquent, depuis le 19 août 1976, date d'entrée en vigueur du document, nous pouvons nous référer à une série de valeurs internationales lorsque nous étudions des questions comme celles que nous étudions aujourd'hui.

Le premier de ces pactes traite des droits économiques, sociaux et culturels; le second, des droits civils et politiques. Notre liste, tirée de ces pactes, se trouve à la page 2 de notre mémoire.

De l'article 6 du second pacte et de l'article 12 du premier, nous avons tiré le droit à la vie et le droit aux services de santé. Tous les autres droits viennent du premier pacte et comprennent l'article 11, le droit à une alimentation, à des vêtements et à un logement suffisants; l'article 10, le droit à la protection et à l'aide à la famille; l'article 13, le droit à une instruction

[Text]

education; Article 7, the right to an opportunity to work, and just and favourable conditions of work; Article 8, the right to participate in trade unions and Article 9, the right to social security.

It is essential that we take just a moment to say a few words about the right to an appropriate education. Many Canadians who are handicapped are denied this basic right referred to in the International Covenant and subscribed to by Canada and the provinces. It is fundamental to the growth and development of all persons that they receive an appropriate education in the least restrictive environment. It is more than interesting to note that Section 23 of the proposed constitution act 1980 provides and I quote:

the right to have their children receive their primary and secondary school instruction in that minority language if they reside in an area

And so on. Surely, there is a missing link in the logic of this section. There is indeed the need to entrench the right to an appropriate education and thereafter to deal with the equally important question of minority language educational rights. Without the entrenchment of that value, the right to an appropriate education, Canadians who live with a handicap condition are at the outset denied the means of access to many of the benefits of Canadian society.

We recognize that it is an imperfect world. Achieving a consensus on a host of positive rights may be difficult, but nevertheless worthy of the great past which is yours at this moment in our history.

There remains the need for an antidiscrimination clause such as Section 15; however, we wish to convey to your Committee the urgent necessity to add to the specific grounds, and I quote:

"handicapping condition", whether physical or mental

The year 1981 will be International Year of the Disabled. It would be an appalling commentary on our Canadian values if we failed to entrench in that year, in our new constitution, protection for all Canadians who live with a handicap whether real or perceived. The usual objection raised to inclusion of handicapped as a prohibited ground of discrimination is that such a measure might obstruct programs designed to remedy the effects of the long history of negative discrimination. We believe that the usual exceptions to affirmative action programs can relieve this concern. And you have dealt with that in the subsection to Section 15.

There is a second objection from those who say that in order to benefit from antidiscrimination clauses a person would first have to identify himself or herself as handicapped. This objection can be overcome if the terminology used is defined broadly, such as we find in a definition of "handicapped person" which can be found in the U.S. Rehabilitation Act of 1973. There "handicapped person" is defined as any person who has (a) a physical or mental impairment which substantially limits one or more of such person's major life activities; (b) has a record of such impairment, or (c) is regarded as having such an impairment.

[Translation]

suffisante; l'article 7, le droit au travail et à des conditions de travail justes et favorables; l'article 8, les droits syndicaux et, l'article 9, le droit à la sécurité sociale.

Arrêtons-nous un instant sur le droit à l'instruction qui est un droit fondamental, mais qui est néanmoins refusé à un grand nombre de Canadiens handicapés en dépit de ce pacte international signé par le Canada et par les provinces. C'est un droit fondamental à la croissance et au développement de toutes les personnes que ce droit à l'instruction dans un environnement le moins restrictif possible. Il est particulièrement intéressant de noter que l'article 23 du projet de loi constitutionnelle 1980 prévoit, et je cite:

le droit de faire instruire leurs enfants, aux niveaux primaire et secondaire, dans la langue de la minorité dans toute région . . .

Etc. Il y a forcément quelque chose qui manque ici et qui porte atteinte à la logique de cet article. Bien sûr, il faut constitutionnaliser le droit à l'instruction sans oublier la question tout aussi importante du droit à l'instruction dans la langue de la minorité. Sans cette valeur qu'est le droit à l'instruction, les handicapés se voient refuser dès le départ de nombreux avantages de la société canadienne.

Nous savons bien que nous vivons dans un monde imparfait. Il est peut-être très difficile de parvenir à un accord sur toute une série de droits positifs, mais c'est une tentative digne de ce grand passé qui est le nôtre.

Une clause anti-discriminatoire telle que l'article 15 est indispensable, mais nous ne saurions trop insister auprès de votre Comité sur l'importance de la mention expresse d'un

handicap, physique ou mental

L'année 1981 sera l'année internationale des handicapés. Il serait vraiment déplorable que nous n'en profitions pas pour constitutionnaliser la protection de tous les Canadiens qui vivent avec un handicap, réel ou perçu. On entend souvent dire qu'il faut éviter de mentionner le cas des handicapés pour éviter de porter atteinte à l'efficacité de programmes destinés à redresser un long passé de discrimination négative. Nous pensons que les exceptions faites d'ordinaire dans le cas des programmes d'action positive peuvent éviter cela. C'est d'ailleurs ce que vous faites dans un paragraphe de l'article 15.

D'autres prétendent que pour profiter d'une clause anti-discriminatoire, il faudrait d'abord prouver que l'on est handicapé. Cette objection ne tient plus si la terminologie est suffisamment large, comme c'est le cas dans la définition de l'expression «personne handicapée» que l'on trouve dans la loi américaine sur la réhabilitation de 1973. On y définit une «personne handicapée» comme étant toute personne qui a (a) une déficience physique ou mentale qui limite considérablement une ou plusieurs activités vitales de cette personne; (b) une personne dont la déficience est documentée ou (c) est considérée comme souffrant d'une déficience.

[Texte]

It is noteworthy that particularly under subsection (c) of this definition the focus is clearly on the act of discrimination rather than on whether the person discriminated against can be fitted into the protected category. That is the essential purpose of the statutory definition.

In summary, Mr. Chairman and members of the Committee, our Association urges this Committee to consider enlarging the statement of positive rights for all Canadians and to consider in particular those economic, social and cultural rights which today form the foundation of our Canadian society.

Finally, we join with many other Canadian organizations and ask that the words "handicapping condition, whether physical or mental", be added to the list of prohibited grounds of discrimination found in Section 15. Thank you.

The Joint Chairman (Senator Hays): Thank you very much, Mr. Vickers.

The honourable Walter Dinsdale.

Mr. Dinsdale: I should like to welcome you three gentlemen who have so effectively represented the cause of the mentally handicapped community in Canada. I am sure you are aware that we have a Special Parliamentary Committee on the Disabled and the Handicapped that has been in action now for almost six months; on the basis of our investigation, we quite soon came to the conclusion that one of the areas of rather tragic neglect so far as human rights are concerned, was that of the mentally handicapped citizens, including both the mentally ill and the mentally retarded.

We had an opportunity to see the people first in action in some of our hearings, and I think members of the Committee will be quite impressed when I tell you that one of the most effective presentations was done quite spontaneously without the benefit of notes by one of your representatives in Vancouver who tried to define mental retardation and this is Brian I am speaking of: he said, "I am mentally retarded", and he tapped his forehead, and said "That means that I think a little slowly", then he paused rather dramatically and said: "I know some politicians who suffer from the same disability". It is obvious from your presentation here this morning that this is the case.

We were so much concerned that our Special Committee produced an Interim Report. I presume you gentlemen have seen that report. One of the statements was to the effect:

Should it be the will of Parliament to entrench human rights in a patriated constitution, your Committee believes that full and equal protection should be provided for persons with physical or mental handicap.

There has been no protection at all. Mr. Chairman, other than the United Nations Human Rights Charter to which we have subscribed; but there is no protection in terms of meeting the needs of the mentally handicapped.

Now, having said that, Mr. Chairman, I wonder if we could get down to specifics and ask the people who are representing the mentally retarded this morning, if they feel that Section

[Traduction]

Il faut remarquer que le paragraphe (c) de cette définition insiste beaucoup plus sur l'acte discriminatoire que sur la question de savoir si la personne qui fait l'objet d'une discrimination peut s'insérer dans la catégorie protégée. C'est l'objectif essentiel de la définition statutaire.

En résumé, notre Association prie instamment les membres de ce Comité d'élargir la déclaration des droits positifs pour tous les Canadiens et de tenir compte en particulier des droits économiques, sociaux et culturels qui sont le fondement actuel de notre société.

Enfin, nous nous associons à un grand nombre d'autres organisations canadiennes pour vous demander d'ajouter la mention «handicap physique ou mental» à la liste des motifs de discrimination interdits qui figurent à l'article 15. Je vous remercie.

Le coprésident (sénateur Hays): Merci beaucoup, monsieur Vickers.

L'honorable Walter Dinsdale.

M. Dinsdale: Je souhaite la bienvenue à ces messieurs qui viennent de défendre si bien la cause des déficients mentaux. Vous devez savoir que nous avons un comité parlementaire spécial chargé d'enquêter sur les déficients et les handicapés et qui travaille depuis maintenant près de six mois. Très vite, nous sommes parvenus à la conclusion que l'un des domaines des droits de l'homme qui était le plus négligé, une négligence allant parfois jusqu'au tragique, était celui des handicapés mentaux, à la fois les malades mentaux et les attardés mentaux.

Pendant nos audiences, nous avons entendu des représentants de *People First*, et l'un des exposés les plus frappants nous a été fait spontanément par un de vos représentants de Vancouver qui n'avait pas de notes et qui a essayé de définir l'arriération mentale. Je parle de Brian. Il a dit: «Je suis un attardé mental», puis il s'est frappé le front et il a ajouté: «Cela veut dire que je ne pense pas très vite». Il a fait ensuite une pause, assez dramatique, puis il a dit: «Je connais des homes politiques qui souffrent de la même incapacité». Ce que vous venez de nous dire ce matin ne fait que le confirmer.

Le sujet nous a tellement inquiétés que notre Comité spécial a jugé bon de publier un rapport intérimaire. J'imagine que vous avez dû le lire; on y disait, entre autres:

Si le Parlement souhaitait constitutionnaliser les droits de l'homme dans une constitution rapatriée, votre Comité estime qu'une protection pleine et entière doit être prévue pour les personnes qui souffrent d'un handicap physique ou mental.

Monsieur le président, jusqu'à présent il n'existe aucune protection en dehors de la charte des droits de l'homme des Nations unies que nous avons signée, aucune protection des handicapés mentaux.

Ceci étant dit, monsieur le président, j'aimerais que nous nous penchions un peu sur les détails et je voudrais demander aux représentants des attardés mentaux qui sont parmi nous ce

[Text]

1—and this has become a big issue during the course of the hearings of this Committee—abrogates the rights that are guaranteed in Section 15 of the bill. I presume the witnesses have the resolution before them. I think this is a fundamental point, because it is quite clear today, Mr. Chairman, that there is discrimination against the handicapped, particularly the mentally handicapped.

It is not an accepted body of thought that the mentally retarded, in particular, should have all the rights under a Human Rights Charter. Are the two in conflict?

Mr. Vickers: Mr. Chairman, my own personal view is that it is giving with one hand and taking away with the other. We have not addressed ourselves specifically to that question, feeling it was our mandate to address the issue of entrenching rights for handicapped people.

But, looking at Section 1, and speaking with my legal hat on for one moment, if I may, it appears to me to be giving with one hand and taking away with the other.

Having read, for example, Mr. Fairweather's comments before the Committee, I am bound to say I subscribe to what he has had to say about appropriate amendments to that section. I feel it does need some work.

Mr. Dinsdale: Mr. Chairman, do I take it that Mr. Vickers is saying that there is a direct contradiction. He has not quite phrased it that way, but the two nullify one another in effect. Is that correct?

Mr. Vickers: Yes, I agree with that. One seems to offset the other.

Mr. Dinsdale: We, in our Interim Report, recommended very strongly that the Charter of Human Rights or the Human Rights Act, in other words, should embrace all the rights that are in the Human Rights Act for the handicapped. Do you think this adequate human rights protection for the people you are representing here this morning? We have a human rights act which was passed in 1977. At that time public opinion was such that the only right that was enshrined in the human rights act—just three years ago, which goes to show how slowly we learn—was the right to employment.

There were numerous arguments put forward at that time to the effect that the human rights act could not go further. We do not propose to outline them here, even though this was the limitation of rights so far as the handicapped was concerned, it did not even embrace the mentally handicapped community, even so far as rights-of-employment are concerned.

Now, if we were to proceed on the basis of the recommendation of the Special Committee—and it is an action-oriented Committee, I can assure you gentlemen—and have the Canadian Human Rights Act amended so that the handicapped community were covered completely by that act, would it be sufficient so far as meeting the needs of the people you are representing this morning is concerned?

Mr. Vickers: Again, I come back to the basic value question. I am thinking in terms of vocational and residential opportunities, and in particular, educational opportunities, if

[Translation]

matin s'ils estiment que l'article 1^{er}, qui fait l'objet de grandes controverses depuis le début de nos audiences, abroge les droits garantis par l'article 15 du projet de loi. J'imagine que nos témoins doivent avoir la résolution sous les yeux. C'est à mon sens un point fondamental, car on s'aperçoit aujourd'hui, monsieur le président, qu'il existe une discrimination certaine contre les handicapés, en particulier les handicapés mentaux.

Le fait que les attardés mentaux devraient jouir de tous les droits d'une charte des droits de l'homme est loin d'être un principe universellement reconnu. Est-ce que les deux articles entrent en conflit?

M. Vickers: Monsieur le président, personnellement j'estime que c'est donner d'une main pour reprendre de l'autre. Nous n'avons pas réfléchi à cette question particulière, car il nous a semblé plus important de nous occuper de la constitutionnalisation des droits des handicapés.

Mais en lisant l'article 1^{er}, en le lisant d'un œil de juriste, j'ai effectivement l'impression qu'on donne d'une main pour reprendre de l'autre.

J'ai lu les observations que M. Fairweather a faites devant le Comité et je dois dire que je suis entièrement d'accord avec les amendements qu'il réclame. Effectivement, cet article mérite qu'on y réfléchisse encore.

M. Dinsdale: Monsieur le président, dois-je en déduire que M. Vickers voit là une contradiction flagrante? Ce n'est pas exactement ce qu'il a dit, mais cela revient à dire que les deux articles s'annulent l'un l'autre, n'est-ce pas?

M. Vickers: Oui, l'un sert de contrepoids à l'autre.

M. Dinsdale: Dans notre rapport intérimaire, nous avons dit avec beaucoup de vigueur que la charte des droits de l'homme ou la Loi sur les droits de la personne devrait regrouper tous les droits qui figurent dans la Loi sur les droits de la personne pour les handicapés. Pensez-vous que cela constituerait une protection suffisante des droits des gens que vous représentez ce matin? Une Loi sur les droits de la personne a été adoptée en 1977. A l'époque, l'opinion publique était telle que le seul droit mentionné dans ladite loi, cela remonte à trois ans et prouve donc bien avec qu'elle lenteur nous apprenons, était le droit à l'emploi.

A l'époque, beaucoup de gens avaient prétendu qu'il était impossible d'aller plus loin. Nous ne voulons pas revenir sur ces arguments aujourd'hui, mais la loi limite les droits accordés aux handicapés, et même pour le droit au travail, les handicapés mentaux ne sont pas mentionnés.

Maintenant, est-ce que vous pensez que les besoins des personnes que vous représentez seraient suffisamment défendus si nous appliquions la recommandation du Comité spécial—je peux attester du dynamisme de ce Comité—and si nous modifions la Loi canadienne sur les droits de la personne en y mentionnant les handicapés?

M. Vickers: Je reviens à cette considération de valeurs. Je pense aux possibilités d'emploi, aux considérations de logement et d'instruction. Si l'on considère cela comme des valeurs

[Texte]

they are, indeed, basic Canadian values, then I would argue that they ought to be entrenched with the Bill of Rights and not placed simply within the human rights legislation which can be amended by Parliament at Parliament's will.

So that if you are talking about basic questions of value, speaking as a Canadian and as an advocate for handicapped people, I would argue that those basic values ought to be entrenched within the constitution and not placed necessarily within the Bill of Rights. A Bill of Rights is a second prize. We have never had any prizes for our handicapped friends, and if we are to take anything, obviously we would be prepared to accept amendments to the federal code.

On the other hand, it is still a second prize so far as we are concerned. The people for whom we advocate are now entitled to a few of the first prizes.

Mr. Dinsdale: You mentioned in your presentation—a vitally important point—access to education and training. We discovered, as we met with 600 people across Canada, that the area of learning disability is totally limited in its services in Canada, and this affects the area of the mentally retarded, in particular.

And the theme is that this has been a good year in Canada for the disabled. We have had the World Congress in Winnipeg and we are coming into the Year of Disabled 1981, and our report will be tabled to coincide with the Year of the Disabled. A theme of the report will be deinstitutionalization, getting the disabled out of what we call human warehouses where the care is merely custodial and where there is no provision for recreational, educational and transportation and all the other vital services that are needed to meet the needs of the disabled community. All this has to it an economic factor as well. It is tremendously expensive—custodial care without any rehabilitation.

So if Parliament enshrines, as you are recommending, a Charter of Rights for the Disabled in specific terms, and if we got rid of the conflict between Sections 1 and 15, do you think it would be helpful in encouraging this process towards deinstitutionalization?

Mr. Mercure: Yes, we believe that type of protection would help our local association to make sure that the specific rights of individuals are protected. This would help us to create services within the community.

This is the reason why deinstitutionalization takes a very long time to accomplish, because most professionals, even most governments, address themselves to deinstitutionalization, but we cannot accept these people within the community without support services, which, in the long run, could be a lot more effective, and sometimes even less costly to the community as a whole.

More than that, we believe that any segregation for any group increases very rapidly the difference in behaviour and also it is a fundamental question of value in our society to accept the human person as he or she is, not to separate or segregate any group.

[Traduction]

canadiennes, effectivement il faudrait les constitutionnaliser dans la déclaration des droits et ne pas se contenter d'une simple mention dans la Loi sur les droits de la personne qui peut être modifiée par le Parlement du jour au lendemain.

Effectivement, si l'on voit le problème sous l'angle des valeurs canadiennes, si l'on se place du point de vue des handicapés, il faudrait que ces valeurs soient constitutionnalisées et qu'elles n'existent pas seulement dans la déclaration des droits. Une déclaration des droits est un deuxième prix. Nos amis handicapés n'ont jamais gagné le moindre prix et, bien sûr, ils ne sont pas en position de refuser quoi que ce soit, ne serait-ce qu'un amendement au code fédéral.

D'un autre côté, c'est toujours un deuxième choix, c'est du moins la façon dont nous voyons les choses. Et les gens que nous défendons ont droit aujourd'hui à quelques premiers prix.

M. Dinsdale: Dans votre exposé, vous avez parlé d'un point particulièrement important, les possibilités d'instruction et de formation. Nous avons rencontré six cents personnes dans tout le Canada et nous nous sommes aperçus que les possibilités d'apprentissage pour les personnes qui souffrent d'un handicap étaient très limitées au Canada, les plus touchés étant les attardés mentaux.

On constate que cette année a été particulièrement bonne pour les handicapés. Nous avons eu le Congrès mondial à Winnipeg et 1981 sera l'Année internationale des handicapés; d'ailleurs, notre rapport doit être publié à cette occasion. Le rapport traitera notamment de la désinstitutionnalisation, c'est-à-dire la possibilité de faire sortir les handicapés de ces entrepôts humains où ils sont parqués, sans possibilité de divertissements, d'instruction et de transport, sans parler de tous les autres services vitaux qui leur sont indispensables. Dans tout cela, il y a également une considération économique; en effet, il en coûte terriblement cher de les garder sans essayer de les réinsérer dans la société.

Par conséquent, si le Parlement constitutionnalise une charte des droits pour les handicapés, comme vous le recommandez, et si nous pouvons supprimer la contradiction entre les articles 1 et 15, pensez-vous que cela servira la cause de la désinstitutionnalisation?

Mr. Mercure: Effectivement, nous pensons que cela devrait aider nos associations locales à protéger les droits des individus. Cela devrait également nous aider à mettre sur pied des services dans la communauté.

S'il faut si longtemps pour désinstitutionnaliser, c'est que la plupart des professionnels, la plupart des gouvernements même, sont en faveur d'une telle démarche mais ils ne peuvent pas concevoir qu'on lâche ces gens dans la communauté sans services auxiliaires ce qui, à long terme, serait pourtant beaucoup plus efficace et probablement beaucoup moins coûteux.

De plus, nous estimons que toute ségrégation débouche très rapidement sur une modification du comportement et que c'est une question fondamentale de valeur pour notre société que d'accepter la personne humaine telle qu'elle est, de ne pas séparer ou aliéner un groupe de gens données.

[Text]

The mental retardation people have not been segregated for a long period of time. It is only in the last 100 years that that problem has arisen from the industrial era. Mentally handicapped people used to live within the community before.

The Joint Chairman (Senator Hays): Thank you very much, Mr. Dinsdale.

Mr. Young.

Mr. Young: Thank you very much. I also want to thank you for appearing before the Committee and presenting such an excellent brief. I am also a member of the Special Committee on the Disabled and the Handicapped, and over the summer months, we had over 400 witnesses who made presentations to that Committee and without exception, everyone argued that disability and handicap should be included in any new charter of rights and freedoms.

I want to center on one specific area, immediately, because, to me, it indicates not only society's attitude towards the disabled and the handicapped, but it is certainly a crystal clear example of the court's attitude towards the disabled and the handicapped, and particularly mentally retarded individuals.

I want to spend a few minutes, if I may, on Section 7 of the proposed charter, legal rights, and to try and tie it into the absence of any provisions for the disabled and the handicapped under Section 15.

Under Section 7 of the proposed charter it is stated:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof

We have, under the Criminal Code, provisions at the present time, to issue a Governor General's Warrant under that particular code, and I am advised as of June 1980 there were 834 individuals who were confined to psychiatric institutions after having been charged with a crime of some sort, and after being assessed by a review board of psychiatrists and lawyers, were declared not to be fit to stand trial.

As I say, there are over 800 Canadians who are confined to institutions who have not been tried, and who, in the case of the mentally retarded individuals, in all probability, will never be fit to stand trial.

There is one case in particular I want to raise with you and that is the one concerning a man by the name of Emerson Bonnar who in 1964 was charged with attempting to steal a woman's handbag.

He has been confined in an institution in New Brunswick—and it is a maximum security institution, as I understand it—since 1964, because the Review Board does not consider him to be fit to stand trial.

In your opinion, in the absence of any specific mention of the disabled and the handicapped under this proposal and the definition under legal rights, would this at this stage help a person like Emerson Bonnar?

Mr. Vickers: I am not sure that would. I am very familiar with the Bonnar case. That case is a classic example of somebody having been labelled early on and having that label

[Translation]

La ségrégation des attardés mentaux ne remonte pas à très loin. C'est seulement depuis une centaine d'années que le problème se pose; c'est une des conséquences de l'industrialisation. Jadis, les handicapés mentaux vivaient dans la communauté.

Le coprésident (sénateur Hays): Merci beaucoup, monsieur Dinsdale.

Monsieur Young.

M. Young: Merci beaucoup. Moi aussi, je voudrais vous remercier d'être venu devant ce Comité et de nous avoir présenté un mémoire de cette qualité. De fait, je siège également au Comité spécial concernant les invalides et les handicapés; pendant l'été, nous avons entendu plus de 400 témoins qui, tous, nous ont dit que les invalidités et les handicaps devaient être mentionnés dans une nouvelle charte des libertés et des droits.

Je passe tout de suite à un domaine précis qui me semble témoigner non seulement de l'attitude de la société envers les invalides et les handicapés, mais également de celle des tribunaux face à ces personnes, en particulier les attardés mentaux.

Si vous le permettez, je vais consacrer quelques minutes à l'article 7 du projet de charte qui porte sur les droits juridiques et je vais essayer de faire le lien avec l'article 15, malgré l'absence de toute disposition relative aux invalides et aux handicapés.

L'article 7 du projet de charte prévoit que:

Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit

A l'heure actuelle, le Code criminel permet au Gouverneur général d'émettre un mandat, et on me dit qu'en date de juin 1980, 834 personnes avaient été envoyées dans des institutions psychiatriques après avoir été accusées d'un crime quelconque et après être passées devant une commission d'examen formée de psychiatres et de juristes qui les avaient déclarés inaptes à subir un procès.

Comme je l'ai dit, plus de 800 Canadiens sont détenus dans des institutions sans avoir jamais été jugés et, dans le cas des attardés mentaux, sans espoir de l'être jamais.

Je vais vous citer un cas à titre d'exemple, celui d'Emerson Bonnar qui, en 1964, a été accusé de tentative de vol d'un sac à main de femme.

Depuis 1964, il est enfermé dans une institution au Nouveau-Brunswick, une institution à sécurité maximum, je pense, parce que la commission d'examen ne l'a pas jugé apte à subir un procès.

Étant donné l'absence de toute mention des invalides et des handicapés dans ce projet et étant donné la définition juridique des droits, pensez-vous que cela pourrait aider une personne comme Emerson Bonnar? -

M. Vickers: Je n'en suis pas certain. Je connais très bien le cas Bonnar. C'est un exemple classique d'un individu à qui on a donné une étiquette dès le début, une étiquette qui lui est

[Texte]

remain on his back throughout his life. He has been labelled "mentally retarded" and "violent" and all the evidence which existed in 1964 and which exists today is contrary to that.

The evidence is that he is not violent. He is yet to be tried for the act of purse snatching. In my submission—and I have said this elsewhere—it is a classic example of the abuse of the criminal justice system. Whether the members of the community know it or not—and Mr. Dinsdale raise the question of the learning disabled—75 per cent to 80 per cent of the youngsters we have in the juvenile justice system are children with learning disabilities, to come back to the educational point. We know that. The jury have been in on that for ten or 15 years.

If the statistics below the border from the President's Committee on Retardation were to carry through in this country—and I suspect they would—approximately ten per cent or better of the adults in the criminal justice system are mentally retarded people. I think it behooves us to recognize these statistics and to deal with the problem as a basic problem in terms of fundamental rights, rather than in terms of the criminal justice system.

Would it not be better, for example, to enshrine the positive rights of education in a bill of rights, and the right to vocational training so that these people can find their appropriate niche in life working in the community as substantial citizens rather than serving out their lives in a maximum security institution for, in the Emerson Bonnar's case, the criminally insane?

There is no doubt that recommendations have been made for the amendment of Section 543 and onwards of the Criminal Code, both by the national Law Reform Commission and our organization made recommendations some six years ago in terms of amendments to that provision, and the fundamental flaw lies in the provisions of the Criminal Code.

I do not deny that appropriate amendments in this bill of rights would be of some assistance. Undoubtedly Emmerson Bonnar has been deprived of his liberty for 14 years according to the principles of Canadian justice and the Canadian Criminal Code. Now, whether they are fundamental justice principles or not is perhaps a rhetorical question when you look at the result.

I would hope that Emmerson Bonnar, and our Association has become an advocate for Emmerson Bonnar and is taking today and continues to take steps to have his status corrected, but any help that we can get, whether that be through amendments to the criminal code or amendments by way of entrenching in a charter of rights would be most helpful.

The Joint Chairman (Senator Hays): Thank you. Mr. Young, your last question.

Mr. Young: Out of those 834 individuals who are confined in those institutions without benefit of trial, have you any knowledge of the numbers of that 834 who are mentally retarded.

Mr. Vickers: No, I cannot speak to those numbers but we are presently doing a survey throughout Canada with the

[Traduction]

restée collée sur le front toute sa vie. On lui a donné l'étiquette d'«attardé mental» et d'«individu violent», mais tout ce qui s'est passé depuis 1964 et que l'on peut constater aujourd'hui prouve que c'est une erreur.

Selon toute évidence, il ne s'agit pas d'un individu violent. Il n'a toujours pas été jugé pour le vol du sac à main. A mon sens, et je l'ai déjà dit, c'est l'exemple classique d'un abus du système pénal. Le public ne le sait peut-être pas, et M. Dinsdale a parlé du problème des difficultés d'apprentissage, mais 75 à 80 p. 100 des jeunes dont s'occupe la justice sont des enfants qui ont des difficultés d'apprentissage, et cela nous ramène au problème de l'instruction. Nous le savons et les juristes y travaillent depuis 10 ou 15 ans.

Si les statistiques du Comité présidentiel américain sur l'arriération pouvaient s'appliquer à ce pays—et j'ai l'impression que c'est le cas—on s'apercevrait qu'environ 10 p. 100 au moins des adultes qui sont aux prises avec le système pénal sont des attardés mentaux. C'est à nous qu'il appartient de reconnaître ces statistiques et de poser le problème en termes de droits fondamentaux et non plus en termes de droit pénal.

Ne vaudrait-il pas mieux, par exemple, constitutionnaliser les droits positifs à l'instruction dans une déclaration des droits, comme le droit à la formation professionnelle, pour que ces personnes puissent se faire une place sur le marché du travail, devenir des citoyens à part entière et non plus gaspiller leur vie, comme Emerson Bonnar, dans des institutions à sécurité maximum, destinées aux aliénés dangereux?

La Commission nationale de réforme du droit et notre organisation ont fait des recommandations, il y a environ six ans, pour la modification des articles 543 et suivants du Code criminel car, en effet, il est certain que le mal vient des dispositions du Code.

Je ne nie pas qu'il serait utile de modifier la charte des droits. Emerson Bonnar est privé de sa liberté depuis 14 ans, au nom de la justice et en vertu du Code criminel. Qu'il s'agisse ou non de principes fondamentaux de la justice, les résultats sont les mêmes.

L'Association a pris parti pour Emerson Bonnar, et nous essayons de faire en sorte que la situation soit corrigée. Toute démarche en notre faveur, qu'il s'agisse de modifier le Code criminel ou d'enchaîner des droits dans la constitution, nous serait fort précieuse.

Le coprésident (sénateur Hays): Merci. Monsieur Young, ce sera votre dernière question.

M. Young: Y en a-t-il, parmi les 834 personnes détenues sans avoir subi de procès, qui sont des déficients mentaux?

M. Vickers: Je l'ignore, mais nous sommes en train de mener une enquête, en collaboration avec les autorités provin-

[Text]

co-operation of the provincial authorities to try and determine that. I can tell you of my own experience when I was with government. The number in British Columbia in 1974 was 120 people.

We had a close look at what we thought were people who were inappropriately placed and by simply taking a close look at what we thought were inappropriate placements, within a short period of time we reduced the numbers from 120 down to 80, and that is with a very superficial, cursory look.

Now, I am not sure what the numbers are in British Columbia today, but I know for example there was a case in British Columbia of a young native Indian person who had been incarcerated there for three years without trial and his own only offence was that he had been public nuisance by throwing a brick through a store window. It is those cases of abuse which I think we could surface many hundreds if we were to look case by case at each individual situation across Canada, and it is that type of research we are trying to conduct right now. I suspect that it would be somewhere in the neighbourhood of perhaps 15 to 20 percent.

The Joint Chairman (Senator Hays): Thank you very much, Mr. Young. Senator Lapointe.

Le sénateur Lapointe: Je voudrais d'abord m'adresser en français à monsieur Mercure pour le féliciter ainsi que ses collègues de leur exposé très clair et très éclairant pour tout le Comité.

Je regrette beaucoup que l'un des membres le plus actif du Comité sur les handicapés, madame Thérèse Killens ne soit pas ici ce matin pour accompagner monsieur Teasdale et l'autre collègue du Parti démocratique, mais je vais essayer de la remplacer de mon mieux, parce que moi aussi je suis très intéressé à cette cause.

Alors vous dites, monsieur Mercure, que vous approuvez totalement la Charte des droits et que vous appuyez les droits fondamentaux, les droits démocratiques, les droits de mobilité et les droits de langage, n'est-ce pas?

M. Mercure: Oui.

Le sénateur Lapointe: Ce qui semble vous inquiéter et dont n'ont pas parlé mes collègues, c'est le droit de faire partie des syndicats, les «trade unions».

Alors est-ce que vous pourriez expliquer si les syndicats eux-mêmes sont réfractaires à vous inclure dans les syndicats ou bien si ça dépend des lois déjà existantes.

M. Mercure: Il y a des cas, effectivement—je demanderais à monsieur Vickers de préciser davantage—mais il y a des cas, effectivement, où des employeurs, il a maintenant aussi un encouragement au Québec l'Office des handicapés cherche grandement à augmenter le nombre de places dans le marché du travail pour les handicapés, dont les déficients.

Il y a plusieurs cas concernant les handicapés où on cherche à obtenir que des emplois soient considérés comme très convenables pour des handicapés et où il est question des droits syndicaux, particulièrement la seniorité, empêchent que ce soit réalisé.

Je donne un exemple, par exemple, des chambres noires pour les aveugles. Dans plusieurs cas on a voulu que des

[Translation]

ciales, pour répondre à cette question. Lorsque j'étais sous-ministre en Colombie-Britannique, en 1974, il y avait 120 personnes dans cette situation.

Nous avons étudié les cas de mauvaise orientation et nous avons pu, en très peu de temps, réduire le chiffre de 120 à 80.

Je ne sais plus combien il y en a en Colombie-Britannique, mais j'a entendu parler d'un jeune Amérindien détenu pendant trois ans sans avoir subi de procès pour avoir lancé une brique dans une vitrine. Si on étudiait le dossier de tous ceux qui se trouvent dans cette situation, on relèverait certainement des abus de ce genre, et nous menons notre enquête. Le chiffre s'élèverait sans doute à 15 ou 20 p. 100.

Le coprésident (sénateur Hays): Merci beaucoup, monsieur Young. Sénateur Lapointe.

Senator Lapointe: I would first like to congratulate Mr. Mercure and his colleagues, in French, on their excellent and enlightening brief.

I am very sorry that one of the most active members of the Special Committee on the Handicapped, Mrs. Thérèse Killens, is not here this morning with Mr. Dinsdale and her colleague from the New Democratic Party, but I will do my best to fill in for her, since I too am very interested in your cause.

You say, Mr. Mercure, that you fully support the Charter of Rights, basic rights, democratic rights, mobility rights and language rights. Do you not?

M. Mercure: Yes.

Senator Lapointe: One issue that seems to be of concern to you, and which my colleagues did not refer to, is the right to join a trade union.

Could you tell us whether the unions themselves are reluctant to let you join, or whether this is based on existing legislation.

M. Mercure: There are cases—and I will ask Mr. Vickers to provide details—where employers... In Quebec, the Bureau for the Handicapped is trying to increase the number of jobs available to the handicapped and the mentally retarded.

There have been several cases involving handicapped persons where an attempt has been made to have jobs considered as being suitable for the handicapped, but union rules, particularly with regards to seniority, have prevented this from being done.

There was, for example, darkroom work for the blind. We wanted photography companies to give blind people priority

[Texte]

aveugles soient prioritairement choisis dans les chambres noires dans des entreprises de photographie, et ces questions là sont refusées par les syndicats, et disons que ce sont des questions qui sont reliées à cette question de «membership» dans les syndicats.

Est-ce que Bill tu pourrais compléter la réponse.

Mr. Vickers: My experience with the trade union movement is no different than my experience with any community organizations, whether they be private or public organizations. It is largely a question of attitude, and given the opportunity and shown that the opportunity exists for handicapped people to work, I have found, certainly with the trade union people that I have spoken to, a willingness to venture into what is a new area.

I have no faults to lay with anyone. It really begins at an early age and that is why appropriate education is so important because if you and I had the opportunity to be educated side by side with a severely, profoundly handicapped person, our attitude today might not be to see that person as a handicap and to feel pity and remorse but to see that person as a whole person, as somebody that can contribute to our Canadian society. My experience with the trade union people, certainly on the west coast, is that when I have raised those kinds of issues they are no different than you and I and they begin to see what they can do.

Now, like employers and like public and private organizations, they are a long way away from actually accomodating the needs of our handicapped friends. That is why to entrench the value is simply to signal, if you will, to the trade union movement that all people, including handicapped people, have that as a basic Canadian right and that is why it is important. It is a beacon, if you will, and it affords our people the opportunity for vocational experiences which they heretofore have not had an opportunity to grasp.

Senator Lapointe: You said that you would like to see the minimum wage mentioned in the charter?

Mr. Vickers: I do not think one would deal with minimum wage per se in the charter. I think what we are talking about in the charter is the opportunity for vocational training and vocational opportunities. David's point was that there are people making two cents an hour in workshops, and I know of workshop situations on the west coast where people are making a dollar a week or things of that sort.

Now, it is time that those workshop opportunities be seen not as opportunities but as situations which keep handicapped people in a demeaning way of life. What we are talking about is not affording more workshop opportunities; we are talking about affording vocational opportunities where people can earn, not be given but earn a wage, and at the very minimum the minimum wage and we know of situations where those opportunities have occurred and people have gone off, if you will, on welfare and have become citizens supporting themselves and their family and community. So we are not asking for anything special, we are simply asking for the same opportunity as other Canadians, so I think that is the point.

[Traduction]

for darkroom work and the request was turned down by the unions. This is the type of thing that is related to the union membership issue.

Maybe Bill could complete my answer.

M. Vickers: Mon expérience avec le mouvement ouvrier m'a montré qu'il n'est pas différent des organisations communautaires, qu'elles soient publiques ou privées. Il s'agit essentiellement d'une question d'attitude, et j'ai constaté que si des personnes handicapées envisagent de travailler, les syndicalistes sont généralement prêts à leur faciliter les choses.

Je n'ai de reproche à faire à personne. Le problème remonte au très jeune âge et c'est pourquoi l'enseignement est tellement important. En effet, une personne qui a la possibilité de faire ses études à côté d'un handicapé grave n'aura probablement pas tendance à adopter, plus tard, une attitude négative à son égard. Au lieu de ressentir de la pitié, elle sera plus prête à l'accepter comme un simple membre de la société canadienne. Lorsque j'ai soulevé ces problèmes sur la côte ouest, auprès des milieux ouvriers, j'ai constaté qu'ils réagissaient de la même manière que vous et moi et qu'ils étaient prêts à faire quelque chose.

Évidemment, tout comme les employeurs normaux et les organisations publiques et privées, ils sont encore loin d'avoir réellement répondu à tous les besoins de nos amis handicapés. C'est pourquoi l'inscription des droits des handicapés dans la constitution est importante, puisqu'elle permettrait de signaler, en quelque sorte, au mouvement syndical que tous, y compris les handicapés, jouissent de droits canadiens fondamentaux. Cela représente en quelque sorte la construction d'un phare pour l'avenir et signifie, pour nos handicapés, qu'ils auront des possibilités professionnelles qui ne leur étaient jusqu'à présent pas offertes.

Le sénateur Lapointe: Vous avez dit que vous aimeriez que le salaire minimum soit mentionné dans la charte?

M. Vickers: Non, je ne pense pas qu'il faille régler cette question, en tant que telle, dans la charte des droits. Je crois qu'il faut plutôt y parler des possibilités de formation et d'emploi. Ce que voulait dire David, c'était qu'il y a aujourd'hui des gens qui gagnent 2c. l'heure dans des ateliers, ou \$1 la semaine, ce qui est inacceptable.

Il est temps que ces ateliers ne soient plus considérés comme des possibilités d'emploi mais comme des situations permettant aux handicapés d'avoir une vie à part entière. Il ne s'agit donc pas de créer plus de possibilités de travail dans des ateliers mais plutôt de nouvelles possibilités d'emploi professionnel, permettant à leurs détenteurs de gagner un salaire normal, et non pas de recevoir une subsistance. Dans ce cas, ces gens devraient gagner au moins le salaire minimum, car cela leur permettrait, comme cela s'est fait dans le passé, de ne plus dépendre du bien-être social et d'être en mesure de subvenir à leurs besoins et à ceux de leur famille. Nous ne demandons

[Text]

Senator Lapointe: I see that you say in the province of Quebec they have a clause to protect the handicapped and you seem quite satisfied with this clause. Would you like to add something to it or to have it as it is in the Quebec government's human rights?

M. Mercure: La loi 9, évidemment, et l'Office des Handicapés au Québec a grandement contribué à la protection des droits des personnes handicapées au Québec et je pense que c'est considéré comme une législation avancée et que plusieurs autres Provinces considèrent une approche comme celle-là et ce que nous demandons ce matin c'est une protection plus grande qu'une protection légale parce qu'une protection dans le texte de la Constitution même, si on modifie l'article numéro 1, serait probablement une protection plus grande qu'une protection légale ordinaire d'une loi parce que le gouvernement ne pourrait pas par une simple loi modifier cet droit-là, il devrait prendre les moyens spéciaux prévus pour amender une Constitution. Il faut dire quand même que les gens au Québec commencent à apprendre à vivre avec ces nouveaux droits et le travail de nos associations locales c'est de s'assurer que ces droits-là ont des résultats concrets dans la vie quotidienne des personnes handicapées.

The Joint Chairman (Senator Hays): The last question, Senator.

Senator Lapointe: Yes. Are you satisfied with the report of the Committee on the disabled when they say that full and equal protection should be provided for persons with physical or mental handicaps? You are satisfied with the declaration and you think it is encouraging?

M. Mercure: Oui. Nous avons mentionné au début que nous sommes très satisfaits d'avoir réussi, je pense, à obtenir le point. Cependant, c'est actuellement dans des termes extrêmement larges, il faudra que ce soit précisé éventuellement, mais le troisième paragraphe du préambule du comité de la Chambre, je l'ai lu tout à l'heure et un membre de la Commission l'a lu aussi, en anglais, c'est un paragraphe que l'on trouve très satisfaisant.

The Joint Chairman (Senator Hays): Thank you very much, Senator Lapointe. We have one more speaker, Mr. McGrath.

Mr. McGrath: I can be very brief, Mr. Chairman. I realize we have another witness; is that correct?

The Joint Chairman (Senator Hays): Yes.

Mr. McGrath: I would not want to keep the Manitoba witnesses waiting any longer because they are going to have little enough time as it is so I will get very quickly to my question.

I was struck by the question of my colleague, Mr. Dinsdale, with respect to the deinstitutionalizing of mildly mentally retarded people. I know that this is something that is happening across the country and indeed it is happening in Ontario. I know of course you are familiar with the Welch Green Paper, Community Living for the Mentally Retarded. I know it is happening in my own province, but something else is happen-

[Translation]

donc rien de spécial mais simplement que leur soient offertes les mêmes possibilités qu'aux autres Canadiens.

Le sénateur Lapointe: Vous dites dans votre mémoire que la province de Québec a une clause de protection des handicapés qui semble vous satisfaire. Voudriez-vous ajouter quelque chose là-dessus ou considérez-vous que cette protection est suffisante dans la mesure où elle est assurée par les droits de la personne au Québec?

Mr. Mercure: Bill 9, of course, as well as the *L'Office des Handicapés au Québec* have been a major step forward for the protection of the rights of handicapped people in that province. I believe this legislation is considered as a very progressive one and that several other provinces are considering implementing something similar. As far as we are concerned, what we want is a greater protection than just a legal one. In other words, we would like this protection to be enshrined in the Constitution, because, even if Section 1 is modified, it would probably afford greater protection than the one offered through a regular legislation, because the government would not be able to change it very easily. It would have to meet the special requirements established for amending the Constitution. I would like to add that people in Quebec are beginning to live with these new rights and the work of our local associations is specifically to make sure that these rights are actually implemented in the daily life of handicapped people.

Le coprésident (sénateur Hays): Ce sera votre dernière question, madame le sénateur.

Le sénateur Lapointe: Très bien. Êtes-vous satisfait du rapport du Comité concernant les invalides et les handicapés, qui affirme qu'il faudrait accorder une protection complète et égale aux personnes souffrant aussi bien de handicaps physiques que de handicaps mentaux?

Mr. Mercure: Yes. We mentioned, at the beginning of our testimony, that we were very pleased to have obtained this statement. However, it is still a very general statement and it will have to be specified later on. The third paragraph of the preamble of the report, which I read a while ago, seems to us to be very satisfactory.

Le coprésident (sénateur Hays): Merci beaucoup, sénateur Lapointe. Il nous reste un orateur, monsieur McGrath.

M. McGrath: Je serai bref, monsieur le président. Nous avons bien un autre témoin, n'est-ce pas?

Le coprésident (sénateur Hays): Oui.

M. McGrath: Je ne voudrais donc pas faire attendre plus longtemps les témoins du Manitoba, d'autant plus que nous ne leur accordons déjà que très peu de temps.

J'ai été frappé par la question de mon collègue, M. Dinsdale, concernant le traitement des handicapés mentaux légers sans avoir recours à des établissements spécialisés. Je sais que c'est quelque chose qui se fait de plus en plus dans le pays et notamment en Ontario. Je sais également que vous connaissez le Livre vert de Welch, intitulé *Community living for the mentally retarded*. Il est cependant un autre aspect de ces

[Texte]

ing with that which disturbs me and I would like to hear how your association feels that this problem can be addressed by specifying handicapped rights within the charter, and that is what seems to be a propensity on the part of municipalities to legislate against group homes, in other words we take the mentally retarded out of the institutions and get away from the Bedlam psychology that still prevails in Canada in terms of our treatment of the mentally retarded, put them in homes so they can lead normal lives and we can treat them as human beings, and we come up against this roadblock of the municipalities trying to protect, I suppose, the best interests of their ratepayers and their neighbourhoods although I can not see how that would be any treat to neighbourhoods or ratepayers, but that is the situation I find developing and it has happened in my own area and I am sure it is happening across the country.

Mr. Vickers: Well, there is not doubt it is happening across the country and there is no doubt it is happening for a number of reasons.

The first reason it is happening, it comes back to the question of attitudes again and where do we begin to change attitudes, and my plea again is that we begin with our youngsters in school accepting the disabilities that our fellow Canadians have.

However, that does not take care of you or I who are aged and do not understand that people with disabilities are the same as us. One of the problems with respect, is the basic funding policies of provincial governments who will fund group homes of eight and ten people, and what we are talking about is a group home, a normal family environment and you know and I know that eight or ten people is hardly a normal family environment so there is a basic funding problem and if we could talk about funding homes of four or five or even six people, then our argument that we were in fact living in community as a family would be more viable. So that is the second problem.

The third problem is the problem of attitude and the problem of the inability to understand that these people have the right to live in community and live normal lives. There have been some recent encouraging decisions across Canada to assist us in this problem, the Bell Case in the Supreme Court of Canada, recently watered down slightly by a decision in the Ontario Supreme Court. We have had decisions made in British Columbia that take away the right of spot zoning in local municipalities, and where you deal with it I suppose is a structural question or an administrative question. It seems to me that if we are going to deal with it once and for all we have to come to grips with some more fundamental questions, attitudes, funding policies and things of that sort.

However, there is no doubt at all that what we are talking about as an association is community living for all Canadians, not just the mildly retarded. We are talking about community living for all Canadians.

The bill in British Columbia, for example, to keep somebody in an institution runs at \$100 per day. We are talking about

[Traduction]

problèmes qui me préoccupent et au sujet duquel j'aimerais avoir la réaction de votre Association. Il s'agit du fait que les municipalités semblent avoir de plus en plus tendance à adopter des législations interdisant les résidences collectives. Donc d'un côté nous voulons faire sortir les handicapés mentaux des établissements publics et les libérer de la psychologie fourre-tout avec laquelle on a toujours voulu les traiter, dans le passé, pour leur permettre de vivre des vies normales, dans toute la mesure du possible. D'un autre côté, cependant, on constate que des municipalités, dans le but, sans doute, de protéger l'intérêt de leurs contribuables, bien que je ne vois pas en quoi cela puisse être une menace à cet égard, adoptent des lois négatives au sujet de ces résidences. Pensez-vous que l'on pourrait régler ce problème au moyen de la charte?

M. Vickers: Il ne fait aucun doute que cela se produit de plus en plus, dans le pays, pour un certains nombre de raisons.

La première concerne, encore une fois, les attitudes générales de la population. Pour les modifier, je répète que nous devons commencer à agir avec les enfants, à l'école, en les incitant à accepter les handicapés dont peuvent souffrir leurs concitoyens.

Évidemment, cela ne règle pas le problème des personnes plus âgées qui ont toujours du mal à accepter les handicapés. L'une des difficultés, selon moi, résulte des politiques de financement des gouvernements provinciaux, lesquelles sont orientées vers des résidences collectives de 8 ou 10 membres. Il est bien évident qu'une résidence acceptant 8 ou 10 personnes est loin de représenter un milieu familial normal. Nous préférions donc que ce type de financement soit accordé à des résidences pour 4, 5 ou même 6 personnes, car, selon nous, cela leur permettrait de vivre dans un milieu beaucoup plus proche du milieu familial.

Le troisième problème résulte de l'incapacité de certaines personnes à comprendre que les handicapés ont parfaitement le droit de vivre normalement, dans leur collectivité. Certes, il y a récemment eu des décisions judiciaires encourageantes à ce sujet, telles que l'affaire Bell, devant la Cour suprême du Canada, laquelle a cependant été un peu diluée, en quelque sorte, par une décision de la Cour suprême de l'Ontario. En Colombie-Britannique, des décisions ont interdit aux municipalités locales d'adopter des règlements de zonage trop limitatifs. Je crois donc que ce problème ne pourra être résolu que par des interventions à la fois structurelles et administratives. Si nous voulons le régler une fois pour toute, nous devrons nous attaquer à des questions plus fondamentales, telles que la modification des attitudes de la population et les politiques de financement des gouvernements.

Cela dit, il ne fait aucun doute que notre recommandation, comme Association, est d'encourager la vie en collectivité pour tous les Canadiens et pas seulement pour les handicapés mentaux légers.

En Colombie-Britannique, le coût des établissements publics s'élève à 100 dollars par jour par résident. Il s'agit donc de

[Text]

\$36,000 per year to keep somebody in an institution without any program and without any opportunity for an adequate social life. We think that those kinds of people can be brought back into the community and be made a part of our community and be given opportunities to thrive within the community for far less money.

Now, there may be transitional funding problems but when the bottom line is looked at, and we look at people, the value question is so important. These are Canadians and surely they have a right to get out of those institutions and live like you and I to the limit of their ability within their community.

Mr. McGrath: But my question was: can we legislate against these kinds of attitudes in an entrenched bill of rights?

M. Mercure: Je dois dire que c'est une question où la situation au Canada est très différente d'un endroit à l'autre.

Je voudrais attirer l'attention du Comité sur le fait qu'au Québec aucune action légale ne peut être prise en vertu d'un règlement de zonage pour empêcher un foyer de groupes de s'établir dans quelle que communauté que ce soit en vertu d'un article de la L^e 9 qui a été obtenu par nos associations.

Alors cette question là, au Québec, et je crois qu'au Manitoba aussi il y a un règlement de même nature qui a un effet provincial et qui empêche, au Québec c'est définitif, aucune poursuite de quelle que façon que ce soit ne peut être entreprise par qui que ce soit pour empêcher un foyer de groupes pour des personnes handicapées de s'établir, quels que soient les règlements de zonage.

C'est une législation provinciale.

Le coprésident (sénateur Hays): Thank you very much, Mr. McGrath.

We appreciate your being here this morning, Mr. Mercure along with Mr. Vickers and Mr. Lincoln.

We have your brief and we will consider it very, very carefully, I am sure the Committee will at the time we are reporting.

We appreciate you being here, thank you very much.

M. Mercure: Merci, et nous comptons bien que votre travail sera très fructueux, merci de votre attention.

Le coprésident (M. Joyal): Merci, monsieur Mercure, monsieur Lincoln et monsieur Vickers.

Je voudrais maintenant demander aux représentants de la Société franco-manitobaine, madame Gilberte Proteau, madame Lucille Roch, directrice générale et Me Joseph-Elliott Magnet, conseiller juridique, de bien vouloir prendre place à la table des témoins.

Il me fait plaisir, au nom des honorables membres de ce Comité de vous souhaiter la bienvenue.

Vous avez remis au greffier de ce Comité un mémoire que vous avez pris l'initiative vous-même d'amender la semaine dernière, et dont vous avez fait parvenir la copie amendée aux membres de ce Comité.

[Translation]

36.000 dollars par an pour maintenir quelqu'un dans un établissement, sans que l'on ait même commencé à parler de programmes de réinsertion sociale. Étant donné l'énormité de ces coûts, nous pensons qu'il serait beaucoup plus rentable de permettre à ces gens de rentrer dans leur communauté, en leur permettant de s'y épanouir.

Certes, il pourrait y avoir des problèmes de financement transitoires pour passer d'un système à l'autre, mais il nous paraît que la dignité individuelle devrait être le facteur fondamental. Ces personnes sont en effet des Canadiens qui ont le droit de vivre comme vous et moi, selon leurs possibilités.

M. McGrath: Certes, mais je vous demandais si nous pourrions interdire ce type d'attitude au moyen d'une charte des droits?

M. Mercure: The situation varies from one part of Canada to the other.

I would like to point out to the committee that in Quebec, under a provision of Law 9 that was lobbied for by our association, no legal action can be taken under zoning regulations to prevent a group home from opening in a community.

In Quebec, then—and I believe Manitoba has a similar regulation—no one can take legal action to prevent group homes for the handicapped from operating, no matter what the zoning regulations are.

It is a provincial law.

The Joint Chairman (Senator Hays): Merci beaucoup, monsieur McGrath.

Nous vous remercions, messieurs, d'avoir bien voulu comparaître.

Nous avons reçu un exemplaire de votre mémoire et nous en tiendrons compte au moment de rédiger notre rapport.

Je vous remercie d'avoir comparu. Nous vous en sommes très reconnaissants.

M. Mercure: Thank you for your attention and we hope that your efforts will produce results.

The Joint Chairman (Mr. Joyal): Thank you, Mr. Mercure, Mr. Lincoln and Mr. Vickers.

I would now ask the representatives of the Société franco-manitobaine, Mrs. Gilberte Proteau, Mrs. Lucille Roch, Director General, and Mr. Joseph-Elliott Magnet, legal adviser, to come to the table.

I am pleased to welcome you on behalf of the committee.

You have given the clerk of the committee a copy of your brief, which you amended last week, and have sent a copy of the amended version to members of the committee.



1982 CASHRA ANNUAL CONFERENCE

(EXTRACT)

OBSTACLES

Report of the Special Committee on the
Disabled and the Handicapped

February 1981
House of Commons

Panel: Section 15 of the Charter: Mental Disability

Montebello, Quebec
May 31 - June 2, 1982

OBJECTIVES

Using these principles as a foundation, the Members of the Special Committee have made recommendations in this Report which are designed to achieve the following objectives for disabled persons:

- Achievement of adequate income.
- Support for promotion of self-help efforts.
- Provision of technical aids, and community support services such as attendant care and intervenor services.
- Equal benefits and protection under the law.
- Equal opportunity of access to public buildings, facilities and programs.
- Equal access to a full range of opportunities in
 - Employment
 - Housing
 - Education
 - Transportation
 - Recreation
 - Communication and Information.
- Provision of community support services to reduce or eliminate the need for institutional care.
- Improved quality of life for disabled persons who live in institutions.

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JURISDICTION

In presenting this Report, the Members realize that the recommendations will call for greater cooperation between the Federal and Provincial Governments. Throughout the hearings, witnesses repeatedly stated that jurisdictional boundaries were no excuse for avoiding necessary actions. The Members have seen their task as pointing out the scope of existing problems, so that the ultimate responsibility for solving them can be speedily recognized and assumed.

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RECOGNITION

In 1981, The International Year of Disabled Persons, the community of disabled persons in Canada is striving for self-determination, and the Members of the Special Committee are in full support of these efforts. At the same time, it must be recognized that much of the progress that has been achieved on behalf of disabled persons over the past fifty years has come through the work of voluntary organizations. Without these pioneers, and the network of services they have created in every province, the prospects for self-help among disabled persons would be greatly diminished.

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PERSPECTIVE

In comparison with the efforts being made in other countries, Canada shows poor progress in assisting disabled persons in the areas of employment opportunities, income security, community support services, and technical aids. The Members can find little reason for this situation other than lack of direction and coordination on the part of government, institutional, and community leaders who have the power to make changes. There are no insurmountable obstacles to prevent Canada from taking a world leadership role in providing disabled persons with the practical means for greater independence.

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FUNDING

The implementation, in their entirety, of the recommendations in this Report is of prime concern to the Special Committee. While many of the recommendations will have only small dollar figures in times of financial restraint, we appreciate the difficulty in expecting to find adequate sums of new money for innovative programs, some of which will cost significant amounts.

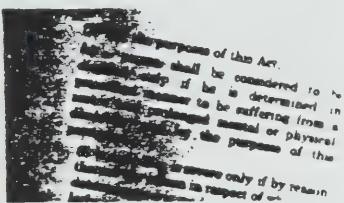
Recognizing the expressed desire of the Government and others "to help those who need it most" and, acknowledging the conviction of many that the concept of universality should prevail, it behooves us to realize that some 2,000,000 Canadians, disadvantaged by reason of disability and who need help the most, are at the same time denied the benefits of universality as applied to opportunities for accessibility, employment, housing, human rights, mobility, etc.

It follows then, that in order to find adequate funds for the disadvantaged, the Government and Canadians should reassess their spending priorities and thereby find monies which are currently being spent on programs which are directed to those who are neither physically, mentally nor financially handicapped. Such an approach would be similar to that followed in other countries, such as Sweden, where they are more progressive than Canada in their assistance to the disabled and handicapped. Without increasing public spending, Canadians have an opportunity to meet the needs of our disabled citizens, and thus join the ranks of those countries who can be proud of the way they recognize the human potential of everyone.

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**THERE ARE NO
INSURMOUNTABLE OBSTACLES
TO PREVENT CANADA
FROM TAKING
A WORLD LEADERSHIP ROLE
IN PROVIDING DISABLED PERSONS
WITH THE PRACTICAL MEANS
FOR GREATER INDEPENDENCE**

AMEND THE HUMAN RIGHTS ACT TO PROTECT DISABLED PERSONS



RECOMMENDATION:

That physical handicap be made a proscribed ground of discrimination for all discriminatory practices listed in the Canadian Human Rights Act, and not just for discriminatory employment practices.

That the Canadian Human Rights Act be further amended so that Tribunal orders can be made with respect to access to goods, services, facilities and accommodation, and that it include a qualification that the changes ordered by a Tribunal should not impose undue hardship on the respondent.

That mental handicaps (learning disabilities, retardation or mental illness) and a previous history of mental illness or a previous history of dependence on alcohol or other drugs be added to the proscribed grounds of discrimination under the Canadian Human Rights Act (CHRA).

Clear Public Direction: Canadians are no longer prepared to accept this form of discrimination in any area of society. By far the most repeated request that the Committee received in its hearings across Canada was for greater protection under the CHRA. In addition, these requests were supported by representations that have been made during the past two years to the Canadian Human Rights Commission, by samplings of public opinion, and by recent legislative developments in several provinces. They all clearly point to the need for improvement under the Canadian Human Rights Act.

Invisible Disabilities: Those Canadians who are mentally ill, or who have learning disabilities, are in special need of protection because their problems tend to be invisible. As a result, there is a general lack of public understanding about the needs, abilities and problems of these individuals. The mentally ill are occasionally considered to be dangerous lunatics. This attitude is reinforced through rumours, jokes and by stereotypes presented in films and television programs. The learning disabled are sometimes branded as lazy, as having a very weak or very low intelligence. Both groups experience discrimination in a variety of everyday situations—particularly when seeking employment. Legal protection, therefore, is needed to safeguard the rights of these individuals who have special needs.

Existing Mechanism: The United States prohibits discrimination on the basis of physical and mental disability in its Rehabilitation Act of 1973. In this country, the Canadian Human Rights Act is an existing mechanism which can be used to provide similar protection for Canadians.

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9

AMEND ELECTIONS ACT TO REDUCE DISQUALIFICA- TIONS BECAUSE OF "MENTAL DISEASE"



RECOMMENDATION:

That the Federal Government amend the Canada Elections Act to reduce the number of people disqualified from voting by reason of "mental disease", by providing clear criteria for determining the specific cases where exclusion from the democratic process is absolutely justified.

Cannot Vote: At the present time, some Canadian citizens are denied their rights vote in Federal elections because of a prohibition under Section 14(4) of the Canada Elections Act, which states that "every person who is restrained of his liberty of movement or deprived of the management of his property by reason of mental disease" does not have the right to vote. Some of these

individuals are residents of psychiatric institutions or "homes of special care" and there is a great deal of confusion, and difference of opinion, regarding their democratic rights.

No Distinctions Made: This confusion is a natural consequence of the general wording of the Act. What is "mental disease"? The Act does not elaborate. There are no distinctions made between different kinds of psychiatric facilities, and no distinctions made between the different situations and conditions of the persons who reside in them. For example, Section 14(4) does not distinguish between a person who is a resident on a voluntary basis from another person who entered the facility involuntarily. Nor does it make any provisions for those persons who are preparing to return to a normal life in the community.

Show Good Cause: The right to vote is basic to the democratic fabric of Canada. The onus should be placed on showing why someone should not be allowed to exercise the right. The present wording of Section 14(4) is not adequate. It is, therefore, important to review this section of the Canada Elections Act and amend the wording so that the number of disqualifications because of "mental disease" are reduced. Clear criteria should be established for determining cases where exclusion from the democratic process is deemed absolutely necessary.

Not Uniform: The office of Chief Electoral Officer has a policy to the effect that no one is deprived of the vote unless he or she is restrained under a court order. However, the law could be interpreted in other ways, and the policy itself has not been uniformly enforced across Canada.

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10

DEVELOP APPROPRIATE LEGAL TERMS RELATED TO MENTAL DISABILITY

RECOMMENDATION:

That the Federal Government direct the Department of Justice to consult with medical authorities to develop appropriate legal terminology relating to mental disability for use in legislation.

Offensive Terms: Federal statutes—such as the Criminal Code, the Land Titles Act, and the National Defence Act—presently employ the terms “idiot”, “imbecile”, “lunatic” and “feeble-minded” to describe various types of mental disability. These are deemed by some people to be offensive, inaccurate and antiquated—and serve mainly to reinforce discriminatory attitudes and practices toward mentally disabled people in all areas of society. These terms should be replaced by currently used terminology which is related to modern psychiatric practice.

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11

CHANGE THE CRIMINAL CODE PROVISIONS ON “INSANITY” AND “FITNESS TO STAND TRIAL”



RECOMMENDATION:

That the Federal Government, through the Department of Justice, and in consultation with provincial health authorities, reform the Criminal Code provisions relating to mentally disabled persons, in order to:

- Develop and implement a new procedure to replace the Lieutenant-Governor’s Warrant, and provide special facilities and treatment of the mentally disabled who are sentenced by the courts;
- Define the rights before the law of mentally retarded and mentally ill persons;
- Establish fair and appropriate procedures for all stages of the criminal process when mentally disabled accused are involved; that is, arrest, bail, fitness to stand trial, the finding of criminal responsibility, and disposition.

Deep Trouble: A mentally disabled person who has the misfortune to be the accused within the criminal justice system of Canada is virtually denied the legal protection and the due process of law which applies to other Canadian citizens.

Indefinite Confinement: For example, a mentally retarded person may be declared unfit to stand trial and be held indefinitely “at the pleasure of the Lieutenant-Governor” without ever being tried for the crime. By the same token, the present system of confinement under one of these “Lieutenant-Governor’s Warrants” does not provide clearly for treatment of the disabled person. On top of these shortcomings, the practice of review boards dealing with the cases of confined persons varies from one province to another.

Law Reform Commission: In 1976, the Law Reform Commission of Canada studied these problems, and recommended that mentally disabled persons, in particular, be returned to the legal system. They should stand trial with lawyers and advocates to protect their interests. If found not guilty, they should be released. If found guilty, then the mental health of the individual would be taken into consideration when determining the penalty. Over the years, other proposals for reform have been made, sometimes conflicting with each other. The time has now come to reach a consensus in this matter, and to take action as soon as possible.

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A mentally retarded person may be declared unfit to stand trial and be held indefinitely.

REVIEW THE OPERATION OF LIEUTENANT- GOVERNOR'S WARRANTS: THE INDEFINITE DETENTION OF MENTALLY DISABLED PERSONS



RECOMMENDATION:

That, pending the replacement of the present legal system of Lieutenant-Governor's Warrants, the Federal Government request the Minister of Justice to meet with provincial authorities in order to review the operation of the warrants, with particular reference to:

- The functioning of review boards, particularly where cases of mentally retarded persons are being considered;

- The individual cases of persons presently being held in indefinite detention under Lieutenant-Governor's Warrants.

834 Persons: As of April 1980, there were 834 persons in Canada being detained indefinitely in psychiatric facilities—or under strict supervision—because they have been deemed "criminally insane". This means that they are either "unfit to stand trial" or have been found to be legally "insane". For some, this detention has already extended over many years. All of these individuals are being detained under Lieutenant-Governor's Warrants—which means that the person will stay in the psychiatric facility for as long as the particular provincial government desires.

Only One Way Out: The only way out of the institution for these people is through the recommendation of a government-appointed review board of doctors and lawyers. At present, the composition and the influence of these boards does not favour the detained person, especially if the person is considered mentally retarded. The latter should be assessed by specialists in the field of mental retardation, in addition to psychiatrists and lawyers. This review board has the power only to make recommendations, not to order the release of an individual. It must state that he or she has recovered from the mental disability, and can be released. But even with this statement, the provincial government can reject the recommendation and refuse to rescind the Warrant.

No Obligations: Under the Lieutenant Governor's Warrants, the particular provincial government is under no obligation to provide any form of treatment to the detained person. This further lack of protection means that the person has no

guarantee of being able to give evidence to the review board that he or she has recovered.

Immediate Explanation: Regarding the 834 individuals who are now being detained, the Committee recommends that an immediate examination be made of why a Warrant continues to be used in each person's case, instead of the "due process of law".

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ENCOURAGE PROVINCES TO KEEP MENTAL HEALTH ACTS UP TO DATE



RECOMMENDATION:

That the Federal Government encourage the provinces to review their mental health acts at regular intervals with input from the public in order to reflect current thinking regarding rights of and treatment for mentally/emotionally disabled persons.

Limited Protection: The Federal Government is very limited in its ability to protect the rights of people

who are being treated for emotional/mental disabilities. The treatment of these persons falls entirely under the regulations of provincial legislation, over which the Federal Government has no jurisdiction. Some provinces are more forward-thinking in their mental health legislation than others. For example: There are significant differences in the time period that a person can be involuntarily detained from one province to another.

Only Way: The only way that the Federal Government can promote uniform and fair treatment for Canadians with emotional/mental disabilities—especially those who are institutionalized—is by encouraging the provinces to review their legislation at regular intervals. The respective acts should constantly be up-dated to reflect current national thinking about the rights and treatment of individuals. The Committee recommends that Federal Government officials who consult with the provinces on matters of mental health give a high priority to this review process.

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The only way that the Federal Government can promote uniform and fair treatment for Canadians with emotional/mental disabilities is by encouraging the provinces to review their legislation at regular intervals.

ENCOURAGE PROVINCES TO INCLUDE EDUCATION AS A BASIC HUMAN RIGHT



RECOMMENDATION:
That the Federal Government encourage all provinces to include in their human rights legislation the right to an education that ensures disabled children the opportunity to reach and exercise their full potential.

Serious Inequity: Throughout its hearings, the Committee received evidence that disabled children, especially those with learning disabilities, do not have equal opportunity to education. While provinces have total responsibility for matters of education, the Committee believes the Federal Government can exercise leadership in pointing out the scope and seriousness of an inequity that exists in many parts of Canada.

No Privilege: Canadians no longer see the education of children as a

privilege to be reserved only for those who can afford it. It is universally agreed that education is a basic right to which all Canadians are entitled, including disabled children. In the United States, this basic right is specified and protected by the Rehabilitation Act and by the Education for All Handicapped Children Act. In Canada, the provinces of Quebec and Saskatchewan have already enacted this fundamental right. Canadian citizens in every province deserve this same protection for their children.

Human Rights: The Committee, recognizing again that this is entirely a provincial responsibility, nevertheless, recommends that the Federal Government encourage all provinces to make the right to an education part of their human rights legislation.

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Canadians no longer see the education of children as a privilege to be reserved only for those who can afford it. It is universally agreed that education is a basic right to which all Canadians are entitled, including disabled children.

17

**PROVIDE
MINIMUM WAGE
GUARANTEE
FOR DISABLED
PERSONS
EMPLOYED
UNDER FEDERAL
JURISDICTION**



RECOMMENDATION:

That the Federal Government phase in a system whereby disabled persons, employed in sheltered work settings or elsewhere, under federal jurisdiction, will be entitled to receive at least minimum wage under the Canada Labour Code.

That the provinces be encouraged to introduce similar measures, following the lead of Quebec.

That in all cases there be close co-ordination to ensure appropriate placement of persons either in sheltered work settings, or in adult activity centres (which are not subject to minimum wage requirements).

Same Protection: Under federal law—and in all provinces except Quebec—disabled persons in some circumstances can be paid less than the minimum wage. The Committee feels that this practice should be phased out in all work settings that are under federal jurisdiction. This applies especially to “sheltered work settings” where products and services are sold competitively on the open market. The possibility of paying lower wages can be an open invitation to exploitation or a cover for bad employment practices. It is discriminatory; disabled persons in such circumstances have the same right to protection under the Canada Labour Code as non-disabled persons.

Distinction: Sheltered work settings must be distinguished from “adult activity centres”, which provide activities and skill training for those unable to function in a work setting. In these centres, disabled persons are frequently paid an allowance, or a small incentive, for attendance.

Sensible Phase-in: It is very important the attainment of this legal right not be gained at the price of people losing their present jobs, or activities. A transition period will be required in which careful attention is paid to the skills of the people concerned, and how they can be best employed.

Note: See also Recommendation 37

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The possibility of paying lower wages can be an open invitation to exploitation or a cover for bad employment practices.

18

**MONITOR
ADULT
OCCUPATIONAL
CENTRES**

RECOMMENDATION:

That, as a condition of cost-sharing under the Canada Assistance Plan, the Federal Government require each province, where it has not already done so, to establish a review mechanism for Adult Occupational Activity Centres which provide daytime activities, not subject to a minimum wage requirement, for those individuals who cannot function in a sheltered work setting.

Protection: “Adult occupational activity centres” are designed to provide stimulation and occupational therapy for individuals who are incapable of gainful employment. There have been serious complaints in testimony presented to the Committee that some centres are not providing quality services to disabled persons. The Federal Government helps to fund these centres through the Canada Assistance Plan. All future funding should now be made contingent upon the provinces establishing mechanisms to monitor the quality of life in these centres.

Note: Persons who are dislocated by the implementation of minimum wage must be guaranteed the opportunity to participate in activity centres.

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19

EXPAND AFFIRMATIVE ACTION EMPLOYMENT PROGRAMS FOR DISABLED PERSONS IN THE FEDERAL GOVERNMENT



RECOMMENDATION:

That the Federal Government require all Departments, Agencies and Crown Corporations to expand or implement Affirmative Action Employment Programs to include:

- Special orientation, recruiting, training and job advancement plans for disabled persons;
- A timetable for implementation;
- Ongoing review and updating of the Programs;
- Regular reporting to an Affirmative Action Compliance Board charged with the initial approval of the Programs;
- Annual public reports.

Unacceptably High: The rate of unemployment for employable disabled Canadians is extraordinarily, and unacceptably high. The precise figure is difficult to determine, but a former Minister of National Health and Welfare, the Honourable Marc Lalonde, estimated this figure to be approximately 50%. A recent publication of National Health and Welfare, stated that the figure was 80%. And COPOH, the Coalition of Provincial Organizations of the Handicapped, suggests that it may range as high as 90%. Whatever the exact figure, there is no doubt that the rate of unemployment for disabled persons is much higher than for the Canadian population as a whole.

Highest Priority: The solutions to many other problems faced by disabled persons can only be achieved when more jobs are provided. The Federal Government must make this the highest priority of all policies and programs for disabled persons, and take whatever action is needed to begin removing the obstacles which prevent employment.

Other Countries: Many European countries and the United States have established successful programs to solve this problem. The United Kingdom has established a quota system, in West Germany there is a penalty system, and in the U.S. an affirmative action program was established under the Rehabilitation Act of 1973. The Members of the Committee feel that the latter program—affirmative action—would work best in Canada, and efforts have already been made to establish a program within the Federal Government.

Existing Efforts Limited: In Canada during the summer of 1980, the Canada Employment and Immigration Commission (CEIC) began to develop and implement an Affirmative Action Program within the

Federal Government. While the Program is well organized and making progress, it has two major limitations:

- **Only Three Departments:** The Program has been undertaken by only three Federal Departments: Employment and Immigration, the Secretary of State and Treasury Board.
- **Only Three Groups:** The Program is directed toward the employment of only three specific groups: women, native persons, and individuals with a physical disability. Persons with any form of mental disability have been excluded.

Expand Program: The Committee, based on testimony received in its hearings across Canada, now recommends that this Program be expanded to include all Departments, Agencies and Crown Corporations, and that the Program be expanded to include persons with mental disabilities.

Counteract Discrimination: "Mental Disability" is a very broad term which says nothing about a particular person's ability to do a particular job. In the past, the term has been used as a discriminatory practice to eliminate an individual automatically from employment consideration. Special efforts must now be made to counteract the effects of this discrimination. The expanded affirmative action program will enable persons with a history of mental disability to be considered for employment on the basis of their ability to do a particular job.

Note: See also recommendation 27.

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BROADEN DEFINITION OF “HANDICAP” IN SPECIAL HIRING PRACTICES



RECOMMENDATION:

That the Federal Government, in its special hiring practices for the disabled, broaden the definition of “handicap” to include persons who have had a mental disability, or who have a learning disability.

That the Federal Government either broaden the mandate of an existing organization—the Advisory Committee to the President of the Treasury Board on the Employment of the Handicapped—to include representation of persons with mental disabilities, or create a new advisory committee to advise the Federal Government about the needs of persons with mental disabilities.

Present Exclusions: In its present special hiring practices, the Federal Government excludes those individuals who have had any form of mental illness, or who have learning disabilities that require special consideration. These exclusions mean

that many Canadian citizens cannot take advantage of a broad range of programs which have been specifically designed to increase the employment opportunities of disabled persons. Some progress has been made for mentally retarded persons, but nothing has been done for those who have a past mental/emotional disability, or who have a learning disability.

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- **Ways and means to expand the industrial capacity and competitiveness of these special suppliers, such as long-term contracts and low-interest loans.**
- **“Set Aside” products and services which are exclusive purchasing contracts that will provide an element of security and continuity to this type of organization.**
- **A review process to protect against exploitation of workers within these special organizations and to ensure that the working conditions and environments are adequate.**

PURCHASE MORE GOODS AND SERVICES FROM SHELTERED WORK SETTINGS



RECOMMENDATION:

That the Federal Government give priority in its purchasing policy in order to ensure that a significant amount of goods and services required by Federal Departments, Agencies and Crown Corporations will be provided by firms and organizations established specially to provide employment opportunities to disabled persons. This policy should include such measures as:

Necessary Shelter: A sheltered work setting is a specifically designed business organization for disabled persons who would otherwise be unable to find employment. These workshops are the subject of considerable controversy among disabled people. On the one hand, it is clear that many disabled persons need special employment protection. In their present condition, these individuals cannot compete in the regular job market. Until such time as new employment opportunities are opened to them in other workplaces, the existing sheltered workshops are a practical necessity.

Poor Performance: On the other hand, it must be recognized that conditions in some workshops are deplorable. Too often they have become charitable institutions rather than business enterprises. Disabled employees are often paid as little as twenty-five cents per hour for producing goods which are then sold at competitive prices on the open market. There is little or no incentive for employees to improve their situation. Instead of being simply a temporary shelter, a workshop frequently becomes a permanent crutch. Staff members often foster an atmosphere of dependence rather than one of growing independence.

Do It Right: The Federal and Provincial Governments already have a considerable financial stake in these workshops. In 1979-80 it provided millions of dollars to the workshop network. That being the case, and faced with the necessity of continuing the workshops, the Federal Government should do everything it can to help these organizations become what they were intended to be—business enterprises.

“Aggressive Purchasing”: A policy of “aggressive purchasing” would mean that the Government would give preferential consideration to sheltered workshops whenever they can provide goods and services that the Government normally purchases. At the same time, the Government is already reviewing with the Canadian Council of Rehabilitation Workshops new strategies by which workshops across Canada can become more competitive through their own efforts.

Protect Employees: Looking past this question of competitiveness, a more basic issue must be addressed, that of the well-being and progress of the disabled employees. The operations of each workshop must be periodically monitored to ensure that employees are not being exploited by their managers, and that the workshop environment provides adequate working conditions.

Note: See also Recommendation 17.

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It must be recognized that conditions in some workshops are deplorable. Too often they have become charitable institutions rather than business enterprises.

32

EXPLORE AGRICULTURAL JOB OPPORTUNI- TIES FOR DISABLED PERSONS



RECOMMENDATION:

That the Federal Government explore with the Provinces and farm organizations, ways to increase the employment opportunities for disabled persons in the agricultural sector.

More Sensible: Each spring and summer Canadian newspapers feature articles about job shortages in Canadian cities alongside articles about labour shortages on Canadian farms. At a time when several hundred thousand Canadians are out of work, Canadian farmers are forced to import workers from Mexico and the Caribbean in order to have dependable help. In several European countries, on the other hand, governments have managed to place thousands of disabled persons, most

of them mentally disabled, in agricultural jobs. The Federal Government should study these European programs as a first step toward increasing job opportunities for disabled Canadians.

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DEVELOP MATERIALS ON DISABILITY FOR TEACHER TRAINING COURSE



RECOMMENDATION:

That provincial ministries of education be encouraged to develop, for use in teacher training programs, course material and teaching aids about physical and mental disability.

Unprepared: As things stand now, most primary school teachers do not know how to deal with a disabled child in their classrooms. Current training programs provide minimal information about disability. This is particularly true when the problem is a learning disability. The Committee heard complaints from parents in every province about the treatment that some learning disabled children receive from teachers who are ignorant about their condition.

Provincial Task: This is entirely a matter of provincial jurisdiction, but the scope and seriousness of the problem needs to be pointed out. Inadequate preparation of classroom teachers is causing serious problems in every part of Canada.



ENCOURAGE PROFESSIONAL SCHOOLS TO LEARN ABOUT DISABILITIES



RECOMMENDATION:

That professional schools and faculties be encouraged to include course material about disability, particularly learning disability and mental illness.

Serious Obstacle: Canadian society depends heavily upon the competence of doctors, nurses, lawyers, social workers, architects and police. At present, there is very little knowledge among these professions concerning the needs of mentally disabled persons, particularly those with learning disabilities and mental illnesses. This ignorance, in varying

degrees, places serious obstacles in the path of disabled persons who are trying to deal with the everyday tasks of living in society.

Early Awareness: The earlier in life that a disabled person receives sensible treatment from society, the fewer long-term problems there will be, both for the person and for society. The professions mentioned above are most likely to encounter disabled persons—simply because the greatest problems that disabled persons have come from conflicts with the very institutions that these professions represent: hospitals, medicine, public buildings, and the legal system.

Training: If professional training programs included content related to understanding the needs of disabled persons, many errors could be avoided.

The earlier in life that a disabled person receives sensible treatment from society, the fewer long-term problems there will be, both for the person and for society. If professional training programs included content related to understanding the needs of disabled persons, many errors could be avoided.

102

DEVELOP STANDARDS OF CARE FOR LONG-TERM INSTITUTIONALIZATION



RECOMMENDATION:

That the Federal Government through the Department of National Health and Welfare, in cooperation with the Provinces, consumer groups, professional associations and voluntary organizations, develop guidelines for standards of care in long-term institutional settings.

Many Concerns: Throughout its hearings, the Committee heard many concerns about the quality of treatment that disabled persons receive in long-term institutional care, and in "homes for special care". It was obvious that, depending on the particular institution, a disabled person can receive care that ranges from excellent to horrible.

Standards Needed: The Department of National Health and Welfare has

already established Guidelines covering the following health services:

- Child and adolescent psychiatric services in general hospitals.
- Adult psychiatric services in general hospitals.
- Burn units.
- Detoxification units.
- Geriatric day hospitals.
- Rehabilitation medicine units.
- Spinal cord injury units.
- Cardiovascular services.

Long-Term: The Department should now begin developing standards for long-term institutional care, with special emphasis on the following problems:

- **Legal Access:** At the present time, some individuals have no access to legal assistance. In many cases, disabled persons are not directly informed of the legal services that can be made available to them.
- **Privacy:** Some institutions provide individuals with almost no privacy, and few provisions are made to protect personal property.
- **Activities:** In most homes for special care, there are no activities whatsoever to keep disabled persons occupied during daytime hours. This problem is compounded by the fact that many of these homes are in rural, isolated areas where there are few community services.
- **Placement:** Serious problems are caused by the fact that young physically disabled persons are being placed in institutions which care for the chronically ill, the mentally retarded and the elderly.
- **Refusal:** It is a fundamental principle of Canadian law that medical treatment can only be given with the informed consent of the

individual who is to receive the treatment, if he is an adult person capable of giving consent. For children, or people who are considered legally incapable, the parent or legal representative can consent, within a framework of safeguards for the individual. At any time, a person or his representative may legally refuse to take some particular treatment. However, few disabled persons are aware of their rights within an institution. Institutions do not inform a person about his or her right to refuse a treatment.

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BARB GOODE

North Vancouver, British Columbia

“We have to be able to fall down before we can get anywhere.”

I am mentally retarded and that means that it takes longer to learn. It takes me longer to understand things. I don't know when I first became aware that I was different, but it must have been at school. I was in special classes all my life. This was at a regular school, so I felt different from the other kids.

Most of the other kids were nice, they played nice. In fact, I find that most people are understanding, but there are some that make things difficult. They make fun of me and call me names, which makes me feel very uncomfortable. People who are handicapped like myself have found the same thing. Most people are nice, but there are a lot of so-called “normal” people who make life difficult. I don't know why they do this. Maybe it's because they don't understand their own problems, and they just feel uncomfortable being around a handicapped person.

“Most people are nice, but there are a lot of so-called ‘normal’ people who make life difficult.”

Right now I am a leader in an organization in North Vancouver called People First. This is a group



of mentally handicapped people who are helping other mentally handicapped people. The name means that we're people first, even though we may be handicapped.

We have two meetings a month and talk about human rights issues, and we also plan a lot of recreational activities. I got involved in People First two-and-a-half years ago because I was very interested in having a place where other mentally handicapped people could speak for themselves. I know it's certainly helped me to speak out. Before, I didn't want to tell how difficult it was for me to concentrate. Now I come right out and tell them. And it was always quite difficult for me to talk on the phone, but now you can't get me off of it.

Mentally handicapped people don't feel comfortable talking to “normal” people, I think it's because we are afraid someone will put us down. That's something we learn very early. It's difficult to get people to treat us like average human beings. You know there are a lot of folks called “normal” who act differently and no one says anything. But if a handicapped person acts differently, they say something. We get put down because of it.

“If a handicapped person acts differently, they say something. We get put down because of it.”

Then there are other people who want to keep us from making mistakes. Everyone else is allowed to make mistakes, but not us. Most people want to help us, and that's great, but sometimes they try too hard. It's like a baby learning how to crawl before it can walk. We have to be able to fall down before we can get anywhere. ■



CONFERENCE ANNUELLE 1982 DE L'ACOSPDH

(EXTRAIT)

OBSTACLES

Rapport du Comité spécial concernant
les invalides et les handicapés

Février 1981
Chambres des communes

Débat: Article 15 de la Charte: Handicap mental

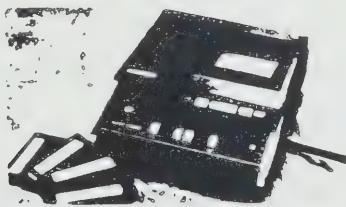
Montebello (Québec)
du 31 mai au 2 juin 1982

OBSTACLES

COMITÉ SPÉCIAL CONCERNANT LES INVALIDES ET LES HANDICAPÉS

PREMIÈRE SESSION, TRENTÉ-DEUXIÈME PARLEMENT, 1980-81

LE TROISIÈME RAPPORT



On peut obtenir le troisième rapport, sous forme de cassettes, en s'adressant à:

Richard Rumes
Greffier
Comité spécial concernant les
Invalides et les Handicapés
Chambre des communes
Ottawa, Ontario
K1A 0A6

OBJECTIFS

A partir de ces principes, les membres du Comité spécial ont formulé dans le présent rapport des recommandations qui sont conçues pour atteindre les objectifs suivants:

- garantie d'un revenu suffisant.
- appui de la promotion des efforts d'entraide.
- fourniture d'aides techniques et prestation de services communautaires de soutien comme des soins personnels et des services d'intermédiaire.
- égalité sur le plan des avantages et de la protection devant la loi.
- égalité d'accès aux immeubles, installations et services publics.
- égalité d'accès à toute une gamme de services dans les domaines suivants
 - emploi
 - logement
 - éducation
 - transport
 - loisirs
 - communications et information.
- prestation de services communautaires de soutien pour réduire ou éliminer la nécessité de soins en établissement.
- amélioration de la qualité de vie pour les personnes handicapées qui vivent en établissement.

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COMPÉTENCE

Au moment de déposer le présent rapport, les membres sont très conscients du fait que leurs recommandations exigeront une plus grande collaboration entre les autorités fédérales et provinciales. Au cours des audiences, les témoins n'ont cessé de répéter que les problèmes de compétence ne justifiaient pas l'inaction. Les membres ont estimé que leur rôle était de signaler l'étendue des problèmes existants pour qu'on puisse savoir rapidement à qui il appartient d'agir et qu'on obtienne sans tarder des mesures concrètes.

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RECONNAISSANCE

En 1981, Année internationale des personnes handicapées, la collectivité des personnes handicapées du Canada déploie des efforts pour se prendre en main, et les membres du Comité spécial appuient sans réserve ces efforts. En même temps, il convient de reconnaître que bien des progrès ont été réalisés, ces 50 dernières années, grâce au travail des organismes bénévoles. Sans ces pionniers et le réseau de services qu'ils ont instauré dans chaque province, les perspectives d'entraide chez les personnes handicapées seraient grandement diminuées.

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PERSPECTIVES

Si l'on regarde les efforts déployés dans d'autres pays, le Canada n'a pas lieu d'être fier de ce qu'il a fait pour aider les personnes handicapées dans des domaines comme l'emploi, la sécurité du revenu, les services communautaires de soutien et les aides techniques. D'après les membres du comité, cette situation est seulement attribuable au peu de direction et de coordination qu'ont assuré les chefs de gouvernement, les dirigeants des établissements et les chefs de file qui ont le pouvoir voulu pour apporter des changements. Il n'existe aucun obstacle insurmontable qui puisse empêcher le Canada de jouer un rôle de premier plan à l'échelle mondiale en fournissant aux personnes handicapées des moyens concrets d'accéder à une plus grande autonomie.

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FINANCEMENT

Le Comité spécial tient avant tout à ce qu'on donne suite à toutes les recommandations énoncées dans le présent rapport. Certaines d'entre elles n'entraîneront aucune dépense considérable, mais nous comprenons la difficulté qu'il peut y avoir en cette période de restrictions financières, à trouver les crédits nécessaires pour instaurer des programmes innovateurs, dont certains comportent des coûts passablement élevés.

Toutefois, le gouvernement et d'autres organismes ont exprimé la volonté d'aider ceux qui en ont le plus besoin, et nous sommes nombreux à être convaincus de la valeur du principe de l'universalité. C'est pourquoi il nous incombe de faire valoir que quelque deux millions de Canadiens défavorisés en raison de leurs handicaps et ayant le plus besoin d'aide sont en même temps privés des avantages de l'universalité en ce qui concerne l'accès, l'emploi, le logement, les droits de la personne, la mobilité, etc.

Il faut donc, si l'on veut trouver les fonds nécessaires pour les défavorisés, que le gouvernement et les Canadiens réévaluent leurs priorités de dépenses pour mobiliser des fonds qui sont à l'heure actuelle consacrés à des programmes destinés à des personnes qui ne souffrent d'aucun handicap, ni physique, ni mental, ni financier. Ce genre d'approche ressemblerait à celle qu'ont adoptée d'autres pays comme la Suède, qui sont beaucoup plus progressistes que le Canada en ce qui concerne l'aide aux invalides et aux handicapés. Sans augmenter les dépenses publiques, les Canadiens peuvent satisfaire les besoins de leurs concitoyens handicapés et se joindre aux pays qui peuvent être fiers de la façon dont ils reconnaissent le potentiel humain de chacun.

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**IL N'EXISTE AUCUN
OBSTACLE INSURMONTABLE
QUI PUISSE EMPÈCHER LE CANADA
DE JOUER UN RÔLE
DE PREMIER PLAN À L'ÉCHELLE MONDIALE
EN FOURNISSANT AUX
PERSONNES HANDICAPÉES
DES MOYENS CONCRETS D'ACCÉDER
À UNE PLUS GRANDE AUTONOMIE**



MODIFIER LA LOI CANADIENNE SUR LES DROITS DE LA PERSONNE POUR PROTÉGER LES PERSONNES HANDICAPÉES

À l'heure de la présente loi, une personne n'est considérée comme handicapée que si elle est dépourvue, de la totalité ou en partie, d'une ou plusieurs capacités normales grave et permanente, et que cette condition n'est pas due à une maladie ou à une blessure temporaire ou à une infirmité. La présente loi ne protège pas les personnes qui sont dépourvues, de la totalité ou en partie, d'une ou plusieurs capacités normales temporairement ou partiellement, et que cette condition n'est pas due à une maladie ou à une blessure temporaire ou à une infirmité.

RECOMMANDATION:

Que le handicap physique devienne un motif de distinction illicite à l'égard de tous les actes discriminatoires énoncés dans la Loi canadienne sur les droits de la personne, et qu'il ne soit pas limité à l'emploi seulement.

Que la Loi canadienne sur les droits de la personne soit en outre modifiée de sorte que les tribunaux puissent émettre des ordonnances à l'égard de l'accès aux biens, aux installations et à l'hébergement et que cette modification précise que les changements ordonnés par un

tribunal ne doivent pas imposer de contrainte excessive aux mis en cause.

Que le handicap mental (difficulté d'apprentissage, déficience ou maladie mentale) et la maladie mentale antérieure ou la dépendance antérieure à l'égard de l'alcool ou d'autres drogues soient ajoutés aux motifs de distinction illicite prévus par la Loi canadienne sur les droits de la personne.

Indications précises du public: les Canadiens réprouvent aujourd'hui cette forme de discrimination dans toutes les sphères de la vie sociale. Des requêtes présentées au Comité, lors de ses audiences, partout au Canada, celle qui, de loin, a été le plus souvent formulée, c'est que la Loi canadienne sur les droits de la personne accorde une protection accrue aux personnes handicapées. En outre, ces demandes sont étayées de mémoires présentés depuis deux ans à la Commission canadienne des droits de la personne, de sondages de l'opinion publique et de mesures législatives qu'ont adoptées dernièrement plusieurs provinces. Tout fait clairement ressortir la nécessité de modifier la Loi canadienne sur les droits de la personne.

Handicaps cachés: les Canadiens qui ont une maladie mentale ou des difficultés d'apprentissage ont particulièrement besoin de protection parce que leurs problèmes sont souvent peu perceptibles. Ainsi, on ne comprend pas leurs besoins, on n'est pas conscient de leurs capacités ni de leurs problèmes. Les malades mentaux sont parfois considérés comme des aliénés dangereux. Les potins, les plaisanteries et les stéréotypes omniprésents au cinéma et à la télévision, viennent renforcer ces préjugés. Quant aux personnes qui éprouvent des difficultés d'apprentissage,

elles sont taxées de paresse et on leur prête des facultés intellectuelles réduites. Ces deux groupes d'êtres humains sont victimes de discrimination à maintes reprises dans leur vie quotidienne, plus particulièrement lorsqu'ils cherchent un emploi. Par conséquent, une protection juridique s'avère nécessaire pour sauvegarder les droits de ces personnes qui éprouvent des problèmes particuliers.

Lois actuelles: aux États-Unis toute discrimination fondée sur les handicaps physiques et mentaux est interdite par le *Rehabilitation Act* adopté en 1973. Chez nous, la Loi canadienne sur les droits de la personne pourrait assurer aujourd'hui la même protection aux Canadiens.

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Les malades mentaux sont parfois considérés comme des aliénés dangereux. Les potins, les plaisanteries et les stéréotypes omniprésents au cinéma et à la télévision, viennent renforcer ces préjugés. Quant aux personnes qui éprouvent des difficultés d'apprentissage, elles sont taxées de paresse et on leur prête des facultés intellectuelles réduites.

9

MODIFIER LA LOI ÉLECTORALE DU CANADA AFIN DE RESTREINDRE LES CAS D'INHABILITÉ À VOTER POUR CAUSE DE «MALADIE MENTALE»



RECOMMANDATION:

Que le gouvernement fédéral modifie la Loi électorale du Canada afin de restreindre le nombre de personnes inhabiles à voter pour cause de «maladie mentale» en établissant des critères précis pour délimiter les cas où il faut absolument empêcher des citoyens d'exercer leurs droits d'électeur.

Inhabile à voter: actuellement, un groupe de citoyens canadiens ne peut voter aux élections fédérales, aux termes du paragraphe 14(4) de la Loi électorale du Canada, qui stipule que le droit de vote doit être refusé «toute personne restreinte dans sa liberté de mouvement ou privée de la gestion de ses biens pour cause de maladie mentale». Certaines de ces personnes sont internées dans des établissements psychiatriques ou dans des «foyers offrant des soins particuliers»; en outre, leur situation prête énormément à confusion et leurs droits démocratiques suscitent des opinions divergentes.

Aucune distinction: cette confusion découle directement de la formulation générale de la Loi. Qu'en-tend-on par «maladie mentale»? La Loi ne précise aucunement. Elle n'établit aucune distinction entre les établissements psychiatriques ni entre les différentes situations et conditions des personnes qui y séjournent. Par exemple, le paragraphe 14(4) ne différencie pas la personne qui séjourne de son propre chef dans un établissement psychiatrique et celle qui y est entrée contre son gré. En outre, la Loi ne fait aucunement mention des personnes qui se préparent à reprendre une vie normale dans la société.

Motif valable: le droit de vote est une prérogative fondamentale dans la démocratie canadienne. Il convient, pour limiter l'exercice de ce droit, de donner des motifs valables. Les termes actuels du paragraphe 14(4) sont inexacts. Par conséquent, il est important de revoir cet article de la Loi électorale du Canada et d'en modifier le libellé afin de restreindre le nombre de personnes inhabiles à voter pour cause de «maladie mentale». Des critères précis doivent être établis pour délimiter les cas où il faut absolument restreindre l'exercice de ce droit.

Manque d'uniformité: selon une directive du directeur général des élections, un citoyen ne peut être privé de son droit de vote que par une décision judiciaire. Cependant, la loi *pourrait* être interprétée autrement et la directive précitée n'est pas interprétée uniformément dans l'ensemble du Canada.

10

ÉTABLIR UNE TERMINOLOGIE JURIDIQUE APPROPRIÉE RELATIVEMENT AU HANDICAP MENTAL



RECOMMANDATION:

Que le gouvernement fédéral demande au ministère de la Justice de consulter les autorités médicales pour établir une terminologie juridique appropriée relativement à la notion de handicap mental, terminologie qui sera utilisée dans les textes de Loi.

Termes blessants: les lois fédérales actuelles comme le Code criminel, la Loi sur les titres de biens-fonds et Loi sur la défense nationale, utilisent les termes: «idiot», «imbécile», «aliéné» et «faible d'esprit» pour décrire divers types de handicap mental. Selon certains, ces termes sont offensants, inexacts et désuets, et surtout, ne font que renforcer l'attitude et le comportement discriminatoires à l'égard des handicapés mentaux dans toutes les sphères de la vie sociale. Ces vocables devraient être remplacés par une terminologie contemporaine faisant appel aux notions de la psychiatrie moderne.

Un handicapé mental qui a le malheur d'être accusé, dans le système de justice criminelle du Canada, est privé de presque toutes les protections juridiques assurées aux autres citoyens canadiens et il n'a pas droit aux procédures judiciaires normales.

11

MODIFIER LES DISPOSITIONS DU CODE CRIMINEL SUR L'«ABERRATION MENTALE» ET LA CAPACITÉ DE SUBIR UN PROCÈS



RECOMMANDATION:

Que le gouvernement fédéral, par l'entremise du ministère de la Justice, et de concert avec les autorités provinciales en matière de santé mentale, consente à réformer les dispositions du Code criminel concernant les handicapés mentaux afin:

- d'élaborer et d'instaurer une nouvelle procédure en remplacement de l'ordonnance du lieutenant-gouverneur, et de prévoir des institutions spéciales où seraient traités les handicapés mentaux condamnés par un tribunal;

- de définir les droits des déficients et des malades mentaux devant la loi;
- de mettre en place des formules appropriées et équitables à tous les stades de la procédure criminelle lorsque des handicapés mentaux sont accusés, à savoir en matière d'arrestation, de cautionnement, de détermination de l'aptitude à subir un procès et de la responsabilité criminelle, et de prononcer la sentence.

Problème grave: un handicapé mental qui a le malheur d'être accusé, dans le système de justice criminelle du Canada, est privé de presque toutes les protections juridiques assurées aux autres citoyens canadiens et il n'a pas droit aux procédures judiciaires normales.

Détention d'une durée indéterminée: par exemple, le déficient mental peut être déclaré inapte à subir un procès et peut être détenu indéfiniment «jusqu'à ce que le bon plaisir du lieutenant-gouverneur de la province soit connu» sans être jugé pour le crime dont on l'accuse. De la même façon, le système actuel d'internement en vertu d'une ordonnance du lieutenant-gouverneur ne prévoit pas explicitement de traitement. Outre ces carences, les pratiques des Commissions d'examen qui étudient les cas de personnes en détention varient d'une province à l'autre.

Commission de réforme du droit: en 1976, la Commission canadienne de réforme du droit a étudié ces problèmes et recommandé que les handicapés mentaux, en particulier, soient, comme les autres personnes, soumis aux procédures judiciaires. Ils doivent subir un procès avec avocats et juge de façon que leurs intérêts soient protégés. S'ils sont reconnus non coupables, ils doivent être remis

en liberté. Dans le cas contraire, la santé mentale de la personne doit être prise en considération avant d'imposer la sentence. Au fil des années, on a proposé d'autres réformes, parfois contradictoires. Il est maintenant temps d'aboutir à un consensus dans ce domaine, et de prendre des mesures dès que possible.

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Selon la formule de l'ordonnance du lieutenant-gouverneur, le gouvernement provincial n'est aucunement tenu d'offrir un traitement à la personne détenue. Cet autre manque de protection signifie que la personne n'a aucune garantie d'être en mesure de faire la preuve de sa réadaptation auprès de la commission d'examen.

12

EXAMEN DE LA PROCÉDURE D'ORDONNANCE DU LIEUTENANT-GOUVERNEUR IMPOSANT LA DÉTENTION DES HANDICAPÉS MENTAUX POUR UNE DURÉE INDÉTERMINÉE



RECOMMANDATION:

Que dans l'attente du remplacement de la procédure actuelle l'ordonnance du lieutenant-gouverneur, le gouvernement fédéral demande au ministre de la Justice de rencontrer les autorités provinciales afin d'examiner cette procédure, tout particulièrement en ce qui a trait:

- au travail des commissions d'examen, plus particulièrement lorsqu'elles étudient le dossier de handicapés mentaux;

- de définir les droits des déficients et des malades mentaux devant la loi;
- de mettre en place des formules appropriées et équitables à tous les stades de la procédure criminelle lorsque des handicapés mentaux sont accusés, à savoir en matière d'arrestation, de cautionnement, de détermination de l'aptitude à subir un procès et de la responsabilité criminelle, et de prononcer la sentence.

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- au travail des commissions d'examen, plus particulièrement lorsqu'elles étudient le dossier de handicapés mentaux;

14

ENCOURAGER LES PROVINCES À FAIRE DU DROIT À L'INSTRUCTION UN DROIT FONDAMENTAL DE LA PERSONNE

RECOMMANDATION:

Que le gouvernement fédéral encourage toutes les provinces à inclure dans leurs lois sur les droits de la personne le droit à l'instruction de façon que les enfants handicapés puissent atteindre leur plein épanouissement.

Grave injustice: lors des audiences, le Comité a entendu des témoins venus dire que les enfants handicapés, surtout ceux qui éprouvent des difficultés d'apprentissage, n'ont pas les mêmes possibilités que les autres en matière d'instruction. Même si l'éducation relève exclusivement des provinces, le Comité estime que le gouvernement fédéral peut se permettre de signaler l'étendue et la gravité d'une injustice qui existe dans plusieurs régions du Canada.

L'éducation n'est pas un privilège: les Canadiens ne considèrent plus

l'éducation des enfants comme un privilège réservé à ceux qui peuvent se le permettre. Il est universellement reconnu que l'instruction est un droit fondamental pour tous les Canadiens, y compris les enfants handicapés. Aux États-Unis, ce droit fondamental est précisé et garanti dans le *Rehabilitation Act* et dans le *Education for All Handicapped Children Act*. Au Canada, le Québec et la Saskatchewan ont déjà consacré ce droit fondamental dans la loi. Les Canadiens de chaque province ont droit à la même protection pour leurs enfants.

Droits de la personne: le Comité recommande néanmoins que le gouvernement fédéral reconnaissant une fois de plus que c'est là une compétence essentiellement provinciale, invite toutes les provinces à inclure le droit à l'instruction dans leurs lois sur les droits de la personne.

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17

GARANTIR LE SALAIRE MINIMUM AUX TRAVAILLEURS HANDICAPÉS DONT L'EMPLOI EST RÉGI PAR L'AUTORITÉ FÉDÉRALE



RECOMMANDATION:

Que le gouvernement fédéral mette progressivement en place une structure qui assurera aux travailleurs handicapés employés dans un milieu protégé régi par l'autorité fédérale un salaire au moins égal au salaire minimum en application du *Code canadien du travail*.

Que l'on incite les provinces à adopter des mesures analogues, suivant en cela l'exemple du Québec.

Que, dans tous les cas, une coordination étroite permette de placer les personnes handicapées de façon satisfaisante soit dans un atelier

protégé ou dans un centre d'activités pour adultes (non soumis aux dispositions sur le salaire minimum).

Une protection uniforme: aux termes de la loi fédérale—and dans toutes les provinces, à l'exception du Québec—les travailleurs handicapés peuvent, dans certaines circonstances, recevoir un salaire inférieur au salaire minimum. Le Comité spécial estime que cette situation devrait être éliminée dans toutes les institutions qui relèvent de la compétence fédérale, en particulier dans les «ateliers protégés» dont les produits et services doivent concurrencer ceux de l'entreprise privée sur le marché. La possibilité d'un salaire inférieur peut être une incitation ouverte à l'exploitation, ou un prétexte à de mauvaises conditions d'emploi. De façon plus générale, il s'agit d'une pratique discriminatoire; dans de telles circonstances, les travailleurs handicapés ont droit à la même protection que les autres aux termes du *Code canadien du travail*.

Distinction: il convient de distinguer les ateliers protégés des «centres d'activités pour adultes», qui proposent des activités et une formation spécialisée aux personnes incapables de travailler dans un atelier. Dans ces centres, les personnes handicapées reçoivent généralement une allocation ou une modeste prime de présence.

Une transition prudente: il est essentiel que la consécration de ce droit ne s'opère pas aux prix de la suppression de l'emploi ou des activités actuelles de personnes handicapées. Il faut prévoir une période transitoire au cours de laquelle on devra veiller particulièrement aux aptitudes des personnes concernées et à la meilleure façon de les mettre en valeur.

Note: Voir également la recommandation n° 35.

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18

CONTRÔLER LA QUALITÉ DES SERVICES PROPOSÉS PAR LES CENTRES D'ACTIVITÉS POUR ADULTES



RECOMMANDATION:

Qu'en contrepartie du partage des frais au titre du Régime d'assistance publique du Canada, le gouvernement fédéral oblige les provinces qui ne l'ont pas encore fait à instituer un dispositif de contrôle des centres d'activités pour adultes qui proposent durant la journée des activités non soumises à l'exigence du salaire minimum à des personnes handicapées qui ne peuvent travailler dans un milieu protégé.

Protection: les «centre d'activités pour adultes» proposent une thérapie basée sur des activités stimulantes aux individus incapables d'occuper un emploi rémunérateur. Des témoins comparaissant devant le Comité se sont plaints de la qualité

des services proposés aux personnes handicapées par certains centres. Le gouvernement fédéral participe au financement de ces centres par l'intermédiaire du Régime d'assistance publique du Canada. A l'avenir, cette participation devrait être soumise à la condition que les provinces instaurent des structures de contrôle de la qualité de la vie dans ces centres. *Note:* conformément à la recommandation numéro 17, les agents chargés d'effectuer ce contrôle devraient veiller à ce que l'on garantisson aux personnes privées de leur emploi par l'exigence du salaire minimum la possibilité d'être accueillies dans un centre d'activités.

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Conformément à la recommandation numéro 17, les agents chargés d'effectuer ce contrôle devraient veiller à ce que l'on garantisson aux personnes privées de leur emploi par l'exigence du salaire minimum la possibilité d'être accueillies dans un centre d'activités.

19

ACCROÎTRE LA PORTÉE DES PROGRAMMES D'ACTION POSITIVE À L'INTENTION DES PERSONNES HANDICAPÉES DANS L'ADMINISTRATION FÉDÉRALE



RECOMMANDATION:

Que le gouvernement fédéral demande à tous les ministères, organismes et sociétés de la Couronne d'accroître la portée de leurs programmes d'action positive ou d'en assurer l'application; ces programmes devront comprendre:

- des services spéciaux d'orientation, de recrutement, de formation et de promotion des personnes handicapées;
- un calendrier d'application;

- un processus permanent de contrôle et de mise à jour;
- la rédaction, à intervalles réguliers, d'un rapport destiné à une commission de contrôle de l'action positive chargée de l'approbation initiale des programmes;
- un rapport public annuel.

Taux de chômage inacceptable: Le taux de chômage parmi les Canadiens handicapés et capables d'occuper un emploi est anormalement élevé. Il est difficile de le déterminer avec précision, mais l'ancien ministre de la Santé nationale et du Bien-Être social, M. Marc Lalonde, estimait qu'il devait se situer aux environs de 50%. Une récente publication du ministère faisait état d'un taux de 80%. La Coalition des organismes provinciaux pour les handicapés estime qu'il pourrait être de 90%. Quoiqu'il en soit, il n'est pas douteux que le taux de chômage parmi les personnes handicapées soit infiniment supérieur à celui de l'ensemble de la population canadienne.

Objectif prioritaire: De nombreux autres problèmes qui se posent aux personnes handicapées ne peuvent être résolus que par une augmentation du nombre des emplois qui leur sont proposés. Le gouvernement fédéral doit accorder la priorité absolue à cet objectif dans les mesures et les programmes destinés aux personnes handicapées et doit s'efforcer par tous les moyens d'éliminer les obstacles à leur emploi.

A l'étranger: Dans plusieurs pays de l'Europe et aux États-Unis, on a mis en place des programmes grâce auxquels ce problème a été résolu. Au Royaume-Uni, il existe un système de contingentement, l'Allemagne fédérale a imposé un système de pénalités, tandis que les États-Unis ont mis en place un programme

d'action positive en application du Rehabilitation Act de 1973. Les membres estiment que cette dernière formule, celle de l'action positive, est celle qui donnerait les meilleurs résultats au Canada; du reste, des efforts ont déjà été entrepris pour mettre en place un tel programme au sein du gouvernement fédéral.

Efforts actuels: Au Canada, au cours de l'été 1980, la Commission canadienne de l'emploi et de l'immigration a entrepris d'élaborer et d'appliquer un programme d'action positive au sein de l'administration fédérale. Même si le programme est bien organisé et qu'il avance bien, il comporte encore deux contraintes importantes.

• **Application dans trois ministères seulement:** Le programme est appliqué dans seulement trois ministères fédéraux: Le ministère de l'Emploi et de l'Immigration, le Secrétariat d'État et le Conseil du Trésor.

• **Application à trois groupes seulement:** Le programme vise à embaucher seulement trois groupes particuliers de personnes: les femmes, les autochtones et les handicapés physiques. Les personnes ayant quelque forme que ce soit de handicap mental ont été laissées de côté.

Accroître la portée du programme: Fort des témoignages reçus au cours de ses audiences dans tout le Canada, le Comité recommande que la portée du programme soit accrue de façon à inclure tous les ministères, tous les organismes et toutes les sociétés de la Couronne et que le programme s'applique en outre aux handicapés mentaux.

Éliminer la discrimination: Le «handicap mental» est un terme très vaste qui ne donne aucune précision sur les aptitudes précises d'une personne

à occuper un poste en particulier. Par le passé, le terme a été utilisé à des fins discriminatoires pour rejeter immédiatement certaines candidatures. Des efforts précis doivent maintenant être déployés pour combattre les conséquences de cette discrimination. Le programme d'action positive élargi fera que les personnes ayant ou ayant déjà eu un handicap mental pourront présenter une demande d'emploi et faire valoir leurs aptitudes pour occuper un poste précis.

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ÉLARGIR LA DÉFINITION DU TERME «HANDICAP» UTILISÉE POUR CERTAINES PRATIQUES PARTICULIÈRES D'EMBAUCHE



RECOMMANDATION:

Que le gouvernement fédéral, dans l'application de ses méthodes actuelles d'embauche des personnes handicapés, élargisse la définition du terme «handicap» afin d'y inclure les personnes qui ont déjà eu des troubles mentaux, ou qui éprouvent des difficultés d'apprentissage.

Que le gouvernement fédéral élargisse le mandat du Comité consultatif du Conseil du Trésor sur l'emploi des personnes handicapées et modifie sa composition pour y inclure des représentants des handicapés mentaux, ou crée un nouveau comité consultatif chargé de conseiller le gouvernement fédéral au sujet des besoins des handicapés mentaux.

Exclusions actuelles: Actuellement, les programmes d'embauche du gouvernement fédéral excluent les personnes qui ont déjà eu des troubles mentaux ou qui ont des difficultés d'apprentissage nécessitant des mesures particulières. De nombreux citoyens canadiens ne peuvent donc pas profiter d'une vaste gamme de programmes qui ont été spécialement conçus pour accroître les possibilités d'emploi des personnes handicapées. Des progrès ont été réalisés en ce qui concerne la catégorie précise des déficients mentaux, mais rien n'a bougé pour les personnes qui ont des troubles mentaux ou émotionnels ni pour les personnes qui éprouvent des difficultés d'apprentissage.

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30

ACHETER PLUS DE BIENS ET DE SERVICES DE FOURNISSEURS SPÉCIAUX



RECOMMANDATION:

Que le gouvernement fédéral modifie sa politique d'achats pour qu'une proportion notable de biens et de services requis par ses ministères et organismes, ainsi que par les sociétés de la Couronne, soient fournis de préférence par des entreprises et

organisations créées pour offrir des possibilités d'emploi aux personnes handicapées. Dans cette perspective, il faudrait prévoir les mesures suivantes:

- des moyens d'accroître la capacité industrielle et concurrentielle de ces fournisseurs spéciaux, grâce à des contrats à long terme et à des prêts à intérêt modique;
- faisant l'objet d'une impartition limitative, c'est-à-dire fournis aux termes de contrats exclusifs, ce qui assurera un élément de sécurité et de continuité à ce genre d'organisation;
- un contrôle régulier afin de protéger de l'exploitation les personnes travaillant dans ces organisations et de s'assurer de la qualité du milieu et des conditions de travail.

Une protection nécessaire: Des établissements protégés ont été créés pour des personnes handicapées qui ne pourraient trouver du travail ailleurs, mais ceux-ci les critiquent beaucoup. Par ailleurs, il est clair qu'un grand nombre d'entre elles ont besoin d'une protection spéciale dans leur travail. Dans leur situation actuelle, elles ne peuvent pas affronter le marché ordinaire du travail. Tant qu'elles n'auront pas accès à de nouvelles possibilités d'emploi dans d'autres milieux professionnels, ces ateliers protégés constituent une nécessité pratique.

Insuffisances: Par ailleurs, il faut reconnaître que les conditions sont déplorables dans certains ateliers. Trop souvent, il sont devenus des institutions de bienfaisance plutôt que des entreprises commerciales. Souvent, les employés handicapés ne touchent que 25c. l'heure pour fabriquer des objets qui sont ensuite vendus à prix concurrentiel sur le

marché. Les employés sont peu ou nullement incités à améliorer leur situation. Au lieu de représenter une solution provisoire, l'atelier devient souvent une béquille permanente. Le personnel favorise souvent une atmosphère de dépendance croissante au lieu d'encourager les employés à devenir plus autonomes.

Miser sur le succès: Le gouvernement fédéral et les provinces ont déjà investi beaucoup d'argent dans ces organismes. Pour cette raison et puisqu'il ne peut pas les supprimer, le gouvernement fédéral devrait faire tout son possible pour aider ces organisations à devenir ce qu'elles étaient censées être, des entreprises commerciales.

Pousser les achats: Une politique en ce sens ferait que le gouvernement accorde la priorité aux ateliers protégés lorsqu'ils peuvent lui fournir les biens et services qu'il achète normalement. Par ailleurs, le gouvernement examine déjà avec le Conseil canadien des ateliers de réadaptation, de nouvelles stratégies grâce auxquelles les ateliers de tout le Canada pourraient devenir plus concurrentiels par leurs propres efforts.

Protéger les employés: Au-delà de cette question de concurrence, une autre plus essentielle se pose, celle du bien-être et de la promotion sociale des employés handicapés. Il faut surveiller périodiquement les activités de chaque atelier pour s'assurer que les dirigeants n'exploitent pas leurs employés et que le milieu de travail offre aux personnes handicapées des conditions de travail satisfaisantes.

Note: Voir également la recommandation 16.

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32

EXPLORER LES POSSIBILITÉS D'EMPLOI DANS L'AGRICULTURE POUR LES PERSONNES HANDICAPÉES



RECOMMANDATION:

Que le gouvernement fédéral étudie avec les provinces et les organismes agricoles les moyens d'étendre les possibilités d'emploi pour les personnes handicapées dans le secteur agricole.

Une meilleure solution: Chaque printemps et chaque été, les journaux canadiens font état de pénuries d'emplois dans nos villes et d'un manque de main-d'œuvre dans nos exploitations agricoles. Alors que des centaines de milliers de Canadiens sont au chômage, les agriculteurs doivent faire venir des travailleurs du Mexique et des Antilles. D'autre part, dans plusieurs pays d'Europe, les gouvernements ont réussi à placer des milliers d'handi-

capés, mentaux la plupart du temps, dans des emplois agricoles. Le gouvernement fédéral devrait étudier cette réussite comme première étape vers l'amélioration des perspectives d'emploi pour les Canadiens handicapés.

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METTRE AU POINT DES AIDES PÉDAGOGIQUES SUR L'INVALIDITÉ DESTINÉS AUX ENSEIGNANTS



RECOMMANDATION:

Que les ministères de l'Éducation soient encouragés à mettre au point, pour la formation des enseignants, des cours et aides pédagogiques sur l'invalidité physique et mentale.

Manque de préparation: à l'heure actuelle, la plupart des instituteurs ne savent pas quel comportement adopter en classe à l'égard des enfants handicapés. Les programmes actuels de formation des enseignants ne donnent presque pas d'information sur l'invalidité. C'est notamment le cas pour les problèmes de difficulté d'apprentissage. Dans toutes les provinces, des parents se sont plaints au comité de la négligence et, ce qui est pire, du traite-

ment dont certains enfants handicapés font l'objet de la part d'instituteurs qui ignorent tout de la condition de ces enfants.

Responsabilité provinciale: il s'agit d'un domaine de compétence exclusivement provinciale, mais l'étendue et l'importance de ce problème doivent être signalées. La préparation insuffisante des enseignants cause de sérieux problèmes dans toutes les régions du Canada.

96

ENCOURAGER LES ÉCOLES DE FORMATION PROFESSIONNELLE À SE RENSEIGNER SUR L'INVALIDITÉ



RECOMMANDATION:

Que les écoles et établissements de formation professionnelle soient encouragés à inclure dans leurs programmes des cours sur l'invalidité notamment sur les difficultés d'apprentissage et sur les maladies mentales.

Problèmes sérieux: le bien-être de la société canadienne dépend beaucoup de la compétence de ses médecins, infirmières, avocats, architectes et policiers. A l'heure actuelle, les membres de ces professions témoignent cependant d'une grave ignorance des besoins particuliers des handicapés mentaux, notamment ceux qui souffrent de difficultés d'apprentissage et de maladies mentales. Cette ignorance plus ou moins grande dresse des obstacles de taille devant les personnes handicapées qui essaient de s'acquitter des tâches quotidiennes de la vie en société.

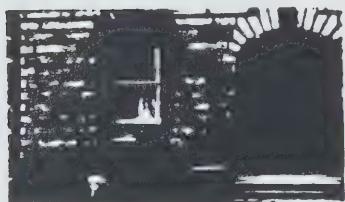
Tôt dans la vie: plus vite une personne handicapée sera traitée convenablement par la société, moins il y aura de problèmes à long terme pour elle et pour la société. Les professions mentionnées ci-dessus sont les plus susceptibles d'avoir à s'occuper de personnes handicapées, tout simplement parce que les plus graves problèmes de ces dernières proviennent des difficultés que leur causent les institutions et les établissements qu'elles représentent: les hôpitaux, la médecine, les lieux publics et la justice.

Formation: Beaucoup d'erreurs pourraient être corrigées si les programmes de formation professionnelle faisaient comprendre les besoins des personnes handicapées.

Plus vite une personne handicapée sera traitée convenablement par la société, moins il y aura de problèmes à long terme pour elle et pour la société.

102

ÉNONCER DES NORMES EN MATIÈRE DE SOINS DISPENSÉS EN ÉTABLISSEMENT



RECOMMANDATION:

Que le gouvernement fédéral, par l'intermédiaire du ministère de la Santé nationale et du Bien-être social, et en collaboration avec les provinces, les organismes de consommateurs, les associations de professionnels et les organismes bénévoles, énonce des lignes de conduite pour l'établissement de normes en matière de soins dispensés en établissement où le séjour est de longue durée.

Nombreuses plaintes: pendant toute la durée de ses séances, le Comité a entendu de nombreuses plaintes concernant la qualité des traitements dispensés aux personnes handicapées dans les établissements où elles

séjournent pour de longues périodes et dans les «foyers de soins spéciaux». Il ressort clairement de ces témoignages que, d'une institution à l'autre, les personnes handicapées peuvent être très bien ou très mal soignées.

Normes nécessaires: le ministère de la Santé nationale et du Bien-être social a déjà établi des lignes directrices relatives aux services de santé suivants:

- Services psychiatriques dispensés aux enfants et aux adolescents dans les hôpitaux généraux.
- Services psychiatriques dispensés aux adultes dans les hôpitaux généraux.
- Unités soignant les brûlures.
- Unités de désintoxication.
- Hôpitaux gériatriques de jour.
- Unités médicales de réadaptation.
- Unités soignant des blessures à la colonne vertébrale.
- Services cardiovasculaires.

Long séjour: le ministère devrait maintenant se mettre à élaborer des normes relatives aux soins dispensés pendant les séjours de longue durée en établissement et tenir compte notamment des problèmes suivants:

- **Services juridiques:** en ce moment, certaines personnes n'ont pas accès à l'aide juridique. Il arrive souvent aussi que les personnes handicapées ne soient pas informées directement des services juridiques dont elles peuvent profiter.
- **Vie privée:** dans certains établissements, les personnes handicapées n'ont pratiquement aucune vie privée et il existe peu de mesures visant à protéger les biens personnels.

- **Activités:** dans la plupart des foyers de soins spéciaux, aucune activité n'est organisée pour occuper les personnes handicapées pendant la journée. Ce problème est encore aggravé du fait qu'un grand nombre de ces foyers sont établis dans des régions rurales éloignées où il n'existe que peu de services communautaires.

- **Placement:** de graves problèmes de soins résultent du fait que de jeunes handicapés physiques sont placés dans des établissements de malades chroniques, de déficients mentaux ou de personnes retraitées.

- **Refus:** en droit canadien, il existe un principe fondamental selon lequel un traitement médical ne peut être dispensé qu'avec le consentement du patient. Dans le cas d'un enfant ou d'une personne jugée en état d'incapacité légale, le parent ou le représentant légal peut donner ce consentement, en respectant toutefois une série de garanties protégeant la personne en cause. En tout temps, une personne ou son représentant légal peuvent refuser légalement un traitement particulier. Peu de personnes handicapées savent cependant qu'elles ont des droits lorsqu'elles sont dans des établissements. On ne les informe pas qu'elles ont le droit de refuser un traitement.

* * * * *

Il ressort clairement de ces témoignages que, d'une institution à l'autre, les personnes handicapées peuvent être très bien ou très mal soignées.

BARB GOODE

Vancouver-Nord (Colombie-Britannique)

«Il faut que nous puissions tomber avant d'arriver à quelque chose.»

Étant déficiente mentale, il me faut plus de temps pour apprendre et pour comprendre. Je ne me souviens pas quand j'ai pris conscience de mon infirmité, mais c'est sans doute à l'école. Toute ma vie, j'ai étudié dans des classes spéciales. Or, comme j'étudiai dans une école ordinaire, j'étais en mesure de constater ce qui me différenciait des autres enfants.

La plupart des autres enfants étaient gentils avec moi. En fait, la plupart des gens font preuve de compréhension, mais certains me rendent les choses difficiles. Certains me ridiculisent ou me lancent des surnoms et cela me blesse.

D'autres déficients mentaux ont, comme moi, vécu des situations semblables. La plupart des gens font preuve de compréhension, mais beaucoup de personnes soi-disant «normales» nous rendent la vie difficile. Pourquoi? Je l'ignore. Peut-être est-ce parce qu'ils ne comprennent pas leurs propres problèmes et que la présence d'un handicapé les trouble.

«La plupart des gens sont gentils, mais de nombreuses personnes soi-disant «normales» nous rendent la vie difficile.»



Je dirige actuellement une organisation à Vancouver-Nord appelée *People First*. Cette organisation, qui regroupe des déficients mentaux, vient en aide à d'autres déficients mentaux. Le nom de l'Association signifie que ses membres sont d'abord, et en dépit de leur infirmité, des personnes.

Notre organisation tient deux réunions mensuelles au cours desquelles nous discutons de questions relatives aux droits de la personne et organisons de nombreuses activités récréatives. Il y a 2 1/2 ans, j'ai adhéré à *People First* parce que je désirais ardemment trouver un endroit où les déficients mentaux peuvent parler en leur propre nom. Auparavant je n'osais pas faire part aux autres des difficultés que j'éprouvais à me

concentrer, mais depuis, j'ai appris à m'exprimer. Je me sens maintenant tout à fait libre d'en parler à mes camarades. J'éprouvais également beaucoup de difficulté à tenir une conversation téléphonique; maintenant, je monopolise le téléphone.

Les déficients mentaux craignent de s'adresser à des personnes «normales», sans doute parce qu'ils ont peur d'être rejetés. Il est difficile d'obtenir qu'on vous traite comme une personne ordinaire. Quand une personne soi-disant normale agit de façon singulière, et cela se produit souvent, on ne rouspète pas. Si une personne handicapée agit différemment, on la rejette.

«Si une personne handicapée agit différemment, on la rejette.»

Aussi, certaines personnes voudraient nous empêcher de commettre des erreurs. Il semble que tout le monde, sauf nous, ait le droit de se tromper. La majorité des gens veulent nous aider, et c'est très bien, mais parfois elles en mettent trop. C'est un peu comme un bébé qui doit apprendre à ramper avant de marcher. Nous devons pouvoir tomber avant d'arriver à quelque chose.»



1982 CASHRA ANNUAL CONFERENCE

(Extract)

Discrimination and the Law in Canada

by

Walter Surma Tarnopolksy

Panel: Section 15 of the Charter: Age Discrimination

Montebello, Quebec
May 31 - June 2, 1982

(EXTRACT)

Discrimination and The Law in Canada

by

Walter Surma Tarnopolsky
B.A., LL.B., A.M., LL.M., F.R.S.C.

RICHARD DE BOO LIMITED
Toronto, Canada

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CHAPTER VII

Age

British Columbia was the first province, in 1964,¹ to add "age" as a prohibited ground of discrimination. In 1966 Ontario followed with a separate statute, *The Age Discrimination Act* which, in 1972, was integrated into *The Human Rights Code*.² During the 1970's all the other jurisdictions, except those of Quebec, Northwest Territories and Yukon, also included "age" as a prohibited ground of discrimination.

In all provinces, with the exception of Manitoba and possibly, British Columbia, the age group that is protected is specified, i.e. 40 or 45 to 64 in all provinces except New Brunswick, where it is 19 and over; Newfoundland, where it is 19 to 64; and Saskatchewan and Prince Edward Island where it is 18 to 64. In British Columbia and Manitoba, where discrimination is prohibited when it occurs "without reasonable cause", "age" is one of the grounds listed which "shall not constitute reasonable cause".³ However, although the Manitoba Act does not do so, in the case of the *Human Rights Code* of British Columbia, age is then defined as meaning "an age of 45 years or more and less than 65 years". Despite this restriction, in the case of *Burns v. United Association of Journeymen of Plumbing and Pipefitting Industry, Local 170, et al.* (1977), a British Columbia Board of Inquiry held that although the word "age", in section 9(2)(a) of the *Human Rights Code*, must be taken to have the special meaning given in the definition section, i.e. that an age between 45 and 65 shall not constitute a reasonable cause, this does not eliminate the consideration of complaints of other complainants of other ages, in examination of "reasonable cause". In this particular case a 31-year-old complainant had not been permitted to register as an apprentice on the ground that a collective agreement only allowed for those under age 25 to be members of the apprenticeship programme. Despite finding that discrimination on the basis of age had occurred, however, the Board of Inquiry dismissed the complaint on procedural grounds. This dismissal on procedural grounds was upheld by

¹ S.B.C. 1964, c. 19 amending the *Fair Employment Practices Act*, R.S.B.C. 1960, c. 137; replaced by the *Human Rights Code of British Columbia*, S.B.C. 1969, c. 10, s. 24, now the *Human Rights Code*, R.S.B.C. 1979, c. 186.

² S.O. 1966, c. 3; repealed S.O. 1972, c. 119, s. 15.

³ Manitoba uses this formulation with respect to access to public places (s. 3) and private or commercial accommodation (s. 4), but not in the case of acquisition of property (s. 5), or employment (s. 6), where "age" is one of a list of prohibited grounds of discrimination.

the British Columbia Supreme Court in a decision⁴ which, *inter alia*, specifically affirmed the Inquiry Board's explanation of the age provision.

Neither the Manitoba⁵ nor the Canadian Human Rights Acts specify the age group protected. However, the Manitoba Act (s. 6(9)) does provide for an exception with respect to employment of persons under the age of majority, as defined in other Manitoba legislation. The Canadian Act (s. 14(b)) contemplates the possibility of exceptions because an individual

(i) has not reached the minimum age, or

(ii) has reached the maximum age that applies to that employment by law⁶ or under regulations, which may be made by the Governor in Council for the purposes of this paragraph....

In both instances, the determination of the exception is made, not by the respective commissions or hearing tribunals, but by the appropriate legislative or executive body. One further example of an exception which would not be subject to determination by adjudication is that set out in the Canadian Act (s. 14(e)) with respect to activities other than employment, when the discrimination takes place on the basis of age "in a manner that is prescribed by guidelines issued by the Canadian Human Rights Commission . . . to be reasonable". What was contemplated here is illustrated by the "Age Guidelines" issued by the Commission in September 1978, which exempt "a reduction or absence of rates, fares or charges with respect to children, youths, or senior citizens" from the prohibition of discrimination with respect to provision of goods, services, facilities or accommodation customarily available to the general public.

Much more general exceptions than these and, therefore, ones which have been the subjects of litigation, are those based upon bona fide qualifications or requirements. Thus, the Canadian Human Rights Act, as well as all of the provincial statutes except, apparently,^{7b} that of Nova Scotia, provide for an exemption based upon a "bona fide occupational qualification or requirement". Some, such as the Acts of Manitoba (s. 6(7)), Newfoundland (s. 9(6)) and Ontario (s. 4(7)) seem also to contemplate that age (along with other grounds) can be a b.f.o.q. which can be claimed by social or fraternal organizations not operated for profit (although it is

⁴ [1978] 22 W.W.R. 22; (1977), 82 D.L.R. (3d) 488.

⁵ In a June 1980, decision in *McIntire v. University of Manitoba et al.* (not yet reported) Hamilton, J. of the Court of Queen's Bench held that since the Manitoba Act does not specify a maximum age, as do the other provinces, "no employer may refuse to continue to employ a person solely on the basis of his age, no matter what that age may be" (p. 29).

^{6a} In *Arnison v. Pacific Pilotage Authority* (Can., 1980) a Human Rights Tribunal held that regulations pursuant to an Act of Parliament did constitute "law" for the purpose of this subsection.

^{6b} It should be noted that the Supreme Court of British Columbia decision in the *Caldwell* case (1980), 114 D.L.R. (3d) 357, discussed at the end of Chapter VI — Religion, *supra*, suggests that that province does not have a b.f.o.q. provision. It should also be noted that the Manitoba provision uses the phrase "reasonable occupational qualification and requirement" (italics added).

difficult to see what such further specific exemptions add to the general ones). Closely related are the provisions that all the provinces, except Manitoba, have for bona fide retirement or employee benefit (such as insurance or pension) plans. The Manitoba provision (s. 7(2)) does not refer to retirement plans and the exemption for discrimination in benefits is permitted "if the Commission is satisfied on the basis of the guidelines set out in the regulations that the distinction is not discriminatory" or that the benefit, insurance or annuity "can be provided only if the distinction is permitted". In other words, the Commission, not a board of inquiry, determines permissible exceptions.

The comparable provisions in the *Canadian Human Rights Act* would appear to have a somewhat different approach from those of the provinces. As far as insurance and pension benefit plans are concerned, section 16 exempts benefits acquired or accrued prior to the commencement of operation of that Part of the Act, while section 18 provides further exemption for any such pension or insurance fund or plan as may be prescribed by regulation by Governor in Council. In addition, paragraph 14(d) exempts any pension fund or plan established by an employer which provides "for the compulsory vesting or locking-in of pension contributions at a fixed or determinable age in accordance with section 10 of the *Pension Benefits Standards Act*". As far as forced retirement is concerned, paragraph 14(c) appears somewhat different from the comparable provisions in the provincial Codes in that it provides an exception from the prohibition against discrimination when the individual whose employment was terminated "has reached the normal age of retirement for employees working in positions similar to the position of that individual". Although these federal provisions are somewhat different from the provincial ones, they are sufficiently related that they will be discussed together.

In discussing the bona fide qualifications or requirements that may be successfully relied upon as exceptions to the prohibition against discrimination on the ground of age, emphasis here will be given primarily to discrimination concerned with denial of, distinctions during, and termination of employment. Nevertheless, some of the issues concern bona fide qualifications with respect to employee benefit plans as well and these must be referred to for comparison and contrast. The main reason for this is that the basic meaning to be given to the words "bona fide" is the same with respect to employment and with respect to benefits, and most cases here and in the United States have been concerned with the former. A secondary reason arises out of what will be suggested here with respect to burden of proof.

A logical distinction arises as to onus of proof concerning bona fides between, on the one hand, occupational qualifications and, on the other, employee benefits. With respect to occupational qualifications, although the Prince Edward Island Act (s. 14(2)) and the Saskatchewan Code (s. 39(2)) are the only ones to specify that the onus of proving the bona fides of a qualification is upon the employer, or the one who asserts it, as is suggested in Chapter IV and is taken up again in Chapter XIV, this must also apply in all other jurisdictions which provide for a b.f.o.q. However,

as concerns employee benefit plans, logic would seem to suggest that the onus concerning the bona fides of the qualification, if not on the one who challenges the plan to disprove it, is at least much lighter on the one who argues in its favour. The fact of the plan being adopted with the concurrence of the employees, or their union, would appear to be a strong presumption of the bona fides of restrictions which are part of the plan, as would its continuance for any period of time. As far as retirement plans are concerned, the placing of the onus would appear to come logically with whether the required retirement age is imposed because it is a part of the employees' benefit plan, or whether it is a policy based upon the requirements, proven or presumed, of the employment itself. It must be easier to discharge the onus in the first situation than in the second.

Before considering the Canadian decisions concerning issues of age discrimination and of bona fide qualifications, it would be useful to refer, at least briefly, to American law on these same matters.

(1) American Law Concerning Age Discrimination and Bona Fide Qualifications

In 1967, Congress passed the *Age Discrimination in Employment Act* (A.D.E.A.)⁶ as an independent scheme rather than as an amendment to Title VII of the 1964 *Civil Rights Act*,⁷ which proscribes employment discrimination on the basis of race, sex, religion, or national origin. Apparently this was done as a matter of administrative convenience because it was felt that the Equal Employment Opportunity Commission (E.E.O.C.) was overburdened with the complaints it already had under Title VII and that age discrimination complaints could be handled more efficiently by the Wage and Hour Division of the Department of Labour.⁸ In 1978, the administration and enforcement of the A.D.E.A. were transferred to the E.E.O.C.⁹

⁶ 29 U.S.C., ss. 621 *et seq.* Among the many articles on the A.D.E.A. of 1967, only a few can be listed here: "Note — The Age Discrimination in Employment Act of 1967" (1976), 90 H.L.R. 380; D.J. Agastein, "The Age Discrimination Act of 1967: A Critique" (1973), 19 N.Y.L. Forum 309; McDougal, Lasswell and Chen, "The Human Rights of the Aged: An Application of the General Norm of Non-Discrimination" (1976), 28 U. of Fla. L. Rev. 639; I. Kovarsky and J. Kovarsky, "Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment" (1974), 27 Vanderbilt L. Rev. 839. For a concise survey of the cases to 1979, see S.H. Pompey, "1979 update: Cases and Issues in Age Discrimination" (1979-80), 6 Jo. of Coll. and Univ. L. 195.

⁷ It should be noted that in 1975 the *Age Discrimination Act* (A.D.A.) was enacted (42 U.S.C. ss. 6101-6107, amended in 1978 by Pub. L. No. 95-478) as the counterpart, with respect to age, to Title VI of the Civil Rights Act, i.e. it prohibits discrimination on the basis of age in federally assisted programs or activities. However, it was not until June 1979 that implementation regulations were issued: Fed. Reg. 33, 768-80 (1979); 45 C.F.R., s. 90, and by mid-1980 the Act had not yet been implemented. It will not, therefore, be discussed here as such. However, for a very detailed analysis of its import, see P.H. Schuck, "The Graying of Civil Rights Law: The Age Discrimination Act of 1975" (1979), 89 Yale L.J. 27.

⁸ *Supra*, fn. 6, H.L.R. note, 381.

⁹ S. 2 of 1978, Reorg. Plan No. 1 of 23, Feb. 23, 1978, 43 Fed. Reg. 19807.

There appear to be three objects of the A.D.E.A.: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment".¹⁰ Or, to put the purpose of the Act into one principle, it has been suggested that its object was "to ensure that hiring decisions are based on objective evaluations of individuals' potential for job performance, rather than on misconceptions about the effects of age on ability".¹¹

What distinguishes age discrimination from other forms of discrimination is that it does not seem to be motivated, as with the other grounds, by prejudice based on dislike or intolerance. As was stated by one Congressman when the proposed Act was debated:¹²

Age discrimination is not the same as the insidious discrimination based on race or creed prejudices and bigotry. These discriminations result in unemployment because of feelings about a person entirely unrelated to his abilities to do a job. This is hardly a problem for the older job-seeker. Discrimination arises for him because of assumptions that are made about the effects of age on performance.

In addition to the absence of feelings of hostility, the other important difference is that at some point age is related to ability. Thus, the most important issue in age discrimination cases is that of the "bona fide qualification".

That age limitations can be justified, even in the face of the Equal Protection clause of the Fourteenth Amendment, has been held in two leading decisions of the Supreme Court of the United States. The first of these, in 1976, was *Massachusetts Board of Retirement v. Murgia*.¹³ In this case, the Supreme Court upheld the validity of a Massachusetts law requiring State Police officers to retire at age 50 on the basis that since physical capacity generally declines with age, mandatory retirement at age 50 was at least "rationally related" to the State's legitimate interest in maintaining a vigorous police force. The Court concluded that mandatory retirement was constitutionally permissible in order for the State to avoid the risk that individual examination of officers over that age would be an ineffective screen for those who were no longer capable of performing strenuous physical duties. The results of this decision are that it would appear that courts will not readily substitute their opinion for a legislative decision and, moreover, that a factor in the consideration is the difficulty or cost of applying a testing procedure to distinguish between those over a certain age who are still capable of performing the task and those who are no longer able to do so. A very important related criterion suggested by the

¹⁰ Senate Report, No. 95-493, 2.

¹¹ H.L.R. Note, *supra*, fn. 6, 381.

¹² *Ibid.*, 383. Also see Schuck, *supra*, fn. 7, 63-72.

¹³ 96 S. Ct. 2562 (1976). See, generally, L.W. Abrahamson, "Compulsory Retirement, the Constitution and the Murgia case" (1977), 42 Miss. L. Rev. 25, and R.M. Macdonald *Mandatory Retirement and the Law*, Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978.

Supreme Court was whether the effect of the retirement policy was to exclude so few who are in fact unqualified as to render the age chosen to be wholly unrelated to the objective.

Subsequent lower court decisions have applied the *Murgia* test. In a 1977 decision,¹⁴ a New York law providing for mandatory retirement of tenured civil servants at age 70 was upheld as being rationally related to legitimate state interests in efficiency, economy and motivation for younger workers to progress through the ranks. Similarly, applying the *Murgia* test, another court upheld¹⁵ a mandatory retirement policy at age 65 for all faculty and staff maintained by Pennsylvania State University. It was stated that even though some individual cases of high excellence may be sacrificed, the policy permitted rational planning both for the university to replace those retired with new staff and for the retiring members to adjust to retirement. On the other hand, applying the same test, another court held¹⁶ that a school board's policy of retiring teachers at age 65 did not meet the test of a reasonable relation to a legitimate purpose, at least in the absence of evidence showing a relationship between the attainment of age 65 and unfitness to teach.

The second Supreme Court decision on this issue, which affirmed the *Murgia* standard, was *Vance v. Bradley*,¹⁷ decided in 1979. The provision in the *Foreign Service Act* for mandatory retirement at age 60 was challenged on the basis that since other government employees were not forced to retire at that age, the requirement for Foreign Service personnel was arbitrary and irrational. However, the Supreme Court held that the provision was rationally related to furthering a legitimate state interest in taking the greatest care, with minimum risk, of ensuring competence and reliability "in all respects". Shortly thereafter a lower court upheld¹⁸ a provision in an Illinois statute for compulsory retirement of judges at age 70. It was rational, the court held, for the state legislature to ensure a vigorous judiciary by imposing a maximum age. Again, as in *Murgia*, it was held that there was no evidence that the age chosen had the effect of excluding so few who were in fact unqualified as to render the criterion of age wholly irrelevant to the objective of the legislation.

What arises out of these decisions, apart from the constitutional principles concerning the Equal Protection clause, is that unlike other grounds of discrimination which are affected by assumptions and stereotypes unrelated to ability, there are not the same invidious grounds for suspecting employment decisions based upon age. This is not to say that the hurt to the dignity of the individual who feels wrongly disqualified or

¹⁴ *Johnson v. Lefkowitz*, 566 F. 2d. 866.

¹⁵ *Klain v. Pennsylvania State University et al.*, 434 F. Supp. 571 (1977) aff'd. 577 F. 2d 726 (1978).

¹⁶ *Gault v. Garrison et al.*, 569 F. 2d 993 (1977).

¹⁷ 99 S. Ct. 939 (1979).

¹⁸ *Trafelet v. Thompson*, 19 F.E.P. Cases 418 (1979).

retired because of age is any less, it is rather that in age cases there seems to be less reason to suspect the employer's motives.

In any case, the A.D.E.A. of 1967 did allow an employer several statutory defences including: age as a bona fide occupational qualification; discharge for cause; and compulsory retirement pursuant to any bona fide retirement, pension or insurance plan that was not a "subterfuge" to evade the purposes of the Act.¹⁹ Of these three defences, only the first and third will be discussed as directly relevant to this study.

As far as the "bona fide occupational qualification" defence is concerned, by the early 1970's a number of leading American cases²⁰ had established that the burden of persuasion as to this defence, under Title VII grounds, was clearly on the employer. Similarly, at least two decisions of courts of appeal²¹ have held the same with respect to the burden of proof in age discrimination cases.

On the matter of the factors to consider in assessing whether an age limitation is a b.f.o.q., it would be useful to consider four leading cases at somewhat greater length.

In the earliest of these, *Hodgson v. Greyhound Lines Inc.*,²² decided in 1974, the defendants' imposition of a maximum hiring age of 35 for intercity bus drivers was upheld. The argument by Greyhound was that in order to guarantee public safety, since the more arduous trips were given to newer and younger drivers, and more senior drivers were able to choose less demanding routes, an age limit was necessary so as not to permit older drivers with less seniority to take the more dangerous trips. In support of this argument Greyhound had introduced evidence concerning the rigours of the work on the more dangerous routes. Evidence regarding degenerative physical changes brought about by the aging process when a person reaches his late thirties, as well as statistical evidence to show the correlation between increased accident rates and the more difficult routes, was submitted. Furthermore, in response to an argument on behalf of the complainant that such changes which do occur as a result of aging could be adequately detected through the elaborate testing procedures employed by Greyhound to screen job applicants, Greyhound presented evidence to the effect that medical experts were not agreed as to whether individualized

¹⁹ 29 U.S.C., s. 623(f)(1)-(3). For discussion of these defences, in addition to the other articles listed in other footnotes to this Part, see M.A. Player, "Defences under the Age Discrimination in Employment Act: Misinterpretation, Misdirection and the 1978 Amendments" (1978), 12 Ga. L. Rev. 747; J.M. Myers, "Employer Defences under the Age Discrimination in Employment Act — Ten Years After", [1978] Det. Coll. L. Rev. 573.

²⁰ *Pond v. Braniff Airways, Inc.*, 500 F.2d 161, 165 (1974); *Diaz v. Pan American World Airways Inc.*, 442 F.2d 385 (1971); appeal to U.S.S.C. denied, 404 U.S. 950 (1971); *Weeks v. Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228, 232 (1969). For a more recent affirmation, see *Marshall v. Westinghouse Electric Corp. et al.*, 576 F.2d 588 (1978), rehearing denied 582 F.2d 966 (1978).

²¹ *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 233-34 (1976); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 861-63 (1974).

²² *Hodgson v. Greyhound Lines, Inc.*, *ibid.*, cert. denied (*sub nom. Brennan v. Greyhound Lines, Inc.*), 419 U.S. 1112 (1975).

examinations could detect degenerative disabilities in older employees. The gist of the Court's decision was that once the employer proved that any change in its hiring practices would affect the *essence* of its business operation and that, as a result, there was evidence of danger to public safety, a maximum hiring age was accepted as being a valid expression of business necessity, and would be upheld. The Court stated that the defendant need only demonstrate "that it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers" and that demonstration of a "minimal increase in risk of harm" is sufficient to discharge the onus.²³

Two years later, in the case of *Usery v. Tamiami Trail Tours, Inc.*,²⁴ another court considered the policy of the defendant bus company not to hire anyone over the age of 40 for the position of bus driver. Although the court, as in *Hodgson*, upheld the company's age limitation as a b.f.o.q., it did so by applying a more stringent test: (1) the job qualifications asserted must be reasonably necessary to the essence of the business in the sense that the business operations would be undermined by hiring individuals over 40; and (2) there must be a factual basis for believing that all or substantially all individuals over the age of 40 would be unable to perform safely and efficiently the duties of the job, which could be proved by showing that it was highly impractical to test each applicant over 40 in order to differentiate the qualified from the unqualified.

Subsequent to the two bus driver cases were two involving pilots. The first of these was *Houghton v. McDonnell Douglas Corp.*²⁵ In this case a federal district court had rejected the *Hodgson* test and applied the one in *Usery* to uphold the corporation's right to remove a 52-year-old test pilot from flying status. The Circuit Court in this decision reversed the lower court, stressing that the age limitation was unnecessary because modern medical technology "can predict a disabling physical condition with virtually fool-proof accuracy".²⁶ Furthermore, the court pointed out, the evidence had demonstrated that the safety record of older pilots was much better than that of younger pilots because of their greater experience. On the other hand, in the case of *Altendifer v. Continental Airlines*,²⁷ a federal court in California held that forced retirement of pilots at age 60 did meet the requirements of the defences under the A.D.E.A. as a b.f.o.q. or a reasonable factor other than age. In the interest of public safety, the court

²³ *Supra*, fn. 21, 863.

²⁴ *Supra*, fn. 21. For a discussion of both *Hodgson* and *Usery* and b.f.o.q.'s in age cases, see J.A. Obee and J.C. Cooper, "Age Discrimination in Employment — The Bona Fide Occupational Qualification Defence — Balancing the Interest of the Older Worker in Acquiring and Continuing Employment Against the Interest in Public Safety" (1978), 24 Wayne L. Rev. 1339.

²⁵ 553 F.2d 561 (1977) cert. denied, 434 U.S. 966 (1977). For a discussion of this case, see R.W. Poe, "Houghton v. McDonnell Douglas Corp.: Age Discrimination and Test Pilots" (1979), 23 St.L.U.L.J. 187.

²⁶ *Ibid.*

²⁷ 19 F.E.P. Cases 1090 (1978).

pointed out, the employer has an obligation to determine the qualifications of flight crew members and, where evidence is that the employer acted in good faith and upon a rational basis in fact, his judgment in qualification standards must be accepted.

Thus it is clear that age as a b.f.o.q. is a varying standard. Public safety is an important factor in determining how carefully the courts will scrutinize the relationship between age and ability and the extent to which they will assert the requirement of individualized screening. Further, whether this latter requirement will be asserted is dependent upon the practicality of individual testing both from the point of view of effectiveness and the matter of costs.

As far as the bona fide retirement or benefit plan defence is concerned, uncertainty surrounding its scope was created by a trilogy of Court of Appeals cases — *McMann v. United Air Lines, Inc.*,²⁸ *Zinger v. Blanchette*,²⁹ and *Brennan v. Taft Broadcasting Co.*³⁰ In *McMann*, the Court held that forced retirement, based only on age, was not covered by the exemption and was unlawful under the Act. On the other hand, in *Zinger*, forced retirement, and in *Brennan*, a plan for profit-sharing upon mandatory retirement, were held to be within the exemption and lawful.³¹

The issue was settled when the *McMann* case was appealed to and reversed by the United States Supreme Court.³² *McMann* was an employee who had voluntarily joined a retirement income plan maintained by his employer, with knowledge that the plan showed the normal retirement to be 60. On being forced to retire at that age, he contended that the retirement was in violation of the A.D.E.A. At issue was the meaning of "subterfuge", particularly whether the employer had the burden of showing that the forced retirement had "some economic or business purpose other than arbitrary age discrimination",³³ as had been held by the Court of Appeals. Chief Justice Burger, speaking for the majority, held that the employer had no such burden and reversed the Court of Appeals.³⁴ He dismissed the argument that the purpose of the exemption was to³⁵

make it economically feasible for employers to hire older employees by permitting the employers to give such older employees lesser retirement and other benefits.

²⁸ 542 F.2d 217 (1976), rev'd 98 S.Ct. 444 (1977).

²⁹ 549 F.2d. 901 (1977).

³⁰ 500 F.2d. 212 (1974).

³¹ See an extensive discussion of these cases in Doppel and Takefman, "The Retirement Plan Exemption in the Age Discrimination in Employment Act of 1967: Will the Exception Swallow the Rule?" (1976), 53 Chi-Kent. L.R. 597, 600-614.

³² *Supra*, fn. 28.

³³ *Ibid.*, 445.

³⁴ *Ibid.*, 446.

³⁵ *Ibid.*, 448.

It is interesting to note that the Senate Report³⁶ accompanying the then pending amendments to the A.D.E.A.³⁷ supported the argument that the Supreme Court had rejected. The purpose of the exemption, according to the Report, "was to facilitate the hiring of older employees by permitting their employment without necessarily providing equal benefits under employee benefit plans".³⁸ The subsequent amendments to the A.D.E.A. vitiated the effects of the Supreme Court decision, as the following proviso was added to the retirement plan exemption: "and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual".³⁹ The maximum protected age was increased from 65 to 70 years, although compulsory retirement at age 65 was exempted for certain types of employees.⁴⁰

(2) Canadian Labour Relations Decisions Considering Age as a Basis for Dismissal or Retirement

Before dealing with the decisions of human rights tribunals and of courts concerning the law prohibiting age discrimination, it would be expedient to consider how labour relations boards and arbitration tribunals have dealt with the issue of age in relation to compulsory retirement and unjust dismissal, not only because this would help in understanding what the anti-discrimination provisions were intended to prevent, but also because, outside the ages protected by the various human rights statutes, the employment relations law continues to apply.

Despite an initial tendency on the part of labour arbitrators to decide the contrary,⁴¹ the Supreme Court of Canada held, in 1973, in the case of *Bell Canada v. Office and Professional Employees' International Union Local 131*,⁴² that there is a clear distinction between "retirement" and "discharge" and the employer does not have the same onus of justifying a retirement as

³⁶ *Supra*, fn. 10.

³⁷ *Age Discrimination in Employment Act Amendments of 1978*, Publ. Law 95-256. For a discussion of these amendments and the McMann case, see D.A. Pushic, "United Air Lines Inc. v. McMann: the Grandfather Clause of the Age Discrimination in Employment Act" (1978), 5 Ohio N.U.L. Rev. 531, as well as the post-1978 articles listed in the footnotes to this Part.

³⁸ *Supra*, fn. 10, 9.

³⁹ *Supra*, fn. 19, s. 2(a).

⁴⁰ Executives and policymakers and university professors with unlimited tenure to allow for upward mobility in those professions. See s. 12, sub-ss. (c)(1) and (d) and the Senate Report, *supra*, fn. 10, 7-9.

⁴¹ For a discussion of the earlier authorities to the contrary, included in a strong criticism of the *Bell Canada* decision of the Supreme Court, see G.W. Adams, "Bell Canada and the Older Worker: Who Will Review the Judges?" (1974), 12 Osgoode Hall L.J. 389.

⁴² [1974] S.C.R. 335; (1973), 37 D.L.R. (3d) 561.

would be the case with a discharge.⁴³ This proposition is accepted in the absence of an express provision in a collective agreement to the contrary.⁴⁴ Even where there is no restriction, in a collective agreement, of the management right to impose compulsory retirement, many cases have suggested that such a right to retire cannot be exercised in an arbitrary, discriminatory, or unreasonable manner.⁴⁵

Perhaps the best summation of these principles is provided in the majority decision of the Ontario Labour Relations Board in the *Re Electrical Power Systems Construction Association* case,⁴⁶ where the cases referred to here, as well as many others, were reviewed and then summarized in the following terms:⁴⁷

From this review of the arbitral jurisprudence there emerges a general principle that management does have a right to implement retirement policies that remains unfettered by general collective agreement language relating to seniority or discharge. This right, however, is not entirely unqualified, being subject to curtailment by specific collective agreement language and by the implied qualification that it not be exercised in an arbitrary, discriminatory, or unreasonable manner. Three factors appear relevant to a determination as to whether a retirement has breached the standard imposed by this implied qualification. First, the prevailing retirement age must be taken into account when determining if a retirement is reasonable. A retirement at an age below the prevailing standard, in the absence of exceptional circumstances, would point to an unreasonable exercise of management's right to retire. A second consideration is whether there has been an equality of treatment in the application of a retirement policy. In the absence of reasonable grounds for making distinctions between employees, unequal treatment must be regarded as being discriminatory. A third factor is the amount of notice given to an employee of the retirement policy. A sudden application of a general policy without prior notice must be regarded as arbitrary, and an improper exercise of management's right to retire.

⁴³ For a few of the arbitration board decisions accepting and applying the *Bell Canada* distinction, see *Re General Freezer Ltd. and U.S.W., Local 7455* (1975), 7 L.A.C. (2d) 365; *Re Oshawa Times and Toronto Newspaper Guild, Local 87* (1977), 14 L.A.C. (2d) 375; *Re Prince Rupert Fishermen's Co-operative Association and Prince Rupert Amalgamated Shoreworkers' and Clerks' Union, Local 1674* (1978), 19 L.A.C. (2d) 308; and the Ontario Labour Relations Board decision in *Re Electrical Power Systems Construction Association and Ontario Hydro and Ontario Allied Construction Trades Council* (1978), 18 L.A.C. (2d) 205.

⁴⁴ The leading decision, even though rendered before the *Bell Canada* case, is that of the Supreme Court of Canada in *Canadian Car & Foundry Ltd. v. Dinham*, [1960] S.C.R. 3; (1959), 21 D.L.R. (2d) 273. For post-*Bell Canada* labour arbitration decisions to this effect, see the *Oshawa Times*, *General Freezer* and *Prince Rupert Fishermen's Co-operative Association* cases, *ibid.*

⁴⁵ This principle goes at least as far back as the decision of Professor Bora Laskin (as he then was) in *Re Rexall Drug Co. Ltd. and International Chemical Worker's Union, Local 279* (1953), 4 L.A.C. 1468. It has been followed in the *General Freezer*, *Oshawa Times* and *Prince Rupert Fishermen's Co-operative Association* cases mentioned in footnote 43, *supra*; and in *Re Trustees of Ottawa Civic Hospital and C.U.P.E. Local 576* (1975), 10 L.A.C. (2d) 314.

⁴⁶ *Supra*, fn. 43.

⁴⁷ *Ibid.*, 214.

In this particular case the grievor was compulsorily retired at age 70 pursuant to a uniformly-applied policy of which the grievor was made personally aware at least several weeks before that time. Although the grievor's ability to do his job was not in dispute, the majority on the Board took into account that *The Ontario Human Rights Code* did not prohibit retirement over age 65 and so decided that the retirement policy was reasonable, not discriminatory, because it was uniformly applied, and not arbitrary because it was adopted six years before and, although there had been no general announcement, it was consistently applied. Besides, the majority suggested, the employee received three weeks' formal notice of his retirement whereas, as a casual employee, he was subject to lay-off at any time with merely one hour's notice.

Before turning from labour arbitration cases, it would be helpful to make the transition to a discussion of boards of inquiry under human rights legislation by considering, at greater length, one of the arbitration cases referred to earlier, i.e. *Re Prince Rupert Fishermen's Co-operative Association*.⁴⁴ In this case Arbitrator Weiler was faced with a grievor who was retired, when he passed age 65, because of the Association's policy on compulsory retirement at that age. The grievor alleged that the employer either did not have "just and reasonable cause" to dismiss him or, if it was a retirement, it was done in a discriminatory manner. Professor Weiler referred to the authority of the *Bell Canada* decision and many of the arbitration cases referred to above, and concluded that "[i]n general . . . the exercise of the employer's right to retire must be 'fair' and 'reasonable'".⁴⁵ Therefore, he asserted, management's rights to retire are arbitrable. In addition, he suggested, since the collective agreement limited management's right to retire by stipulating that there should be no discrimination on the basis of, *inter alia*, age, reference should be made to the *Human Rights Code of British Columbia*, section 8 of which stipulated that a reasonable cause is required to discriminate on the basis of age. He relied upon the *Burns* decision of the Board of Inquiry, upheld in the British Columbia Supreme Court,⁴⁶ for the proposition that although ages 45 to 64 were specifically stipulated as not constituting reasonable cause, the reasonable cause provision covered other ages outside the prohibited range. Upon analyzing section 8 of the Code, he gave the following explanation of the "reasonable cause" concept in section 8:⁴⁷

Having identified the types of distinctions which are not prohibited by s. 8, I am of the view that the concept of reasonable cause is in s. 8 to protect classes or categories of persons and individual members of such classes or categories from prejudicial conduct, related to the differentiating group characteristic which distinguishes the classes or categories from others in society.

⁴⁴ *Supra*, fn. 43.

⁴⁵ *Ibid.*, 313.

⁴⁶ *Supra*, fn. 4.

⁴⁷ *Supra*, fn. 43, 317.

Applying this analysis to the case before him, he suggested the following as to the onus of proof:⁵²

I am of the view that the onus of proof in arbitration proceedings where the arbitrator is required to determine whether a violation of the Human Rights Code (and perforce the collective agreement) has occurred should be that which is used in complaints before a board of inquiry appointed under the Human Rights Code. Accordingly, once the union has proved a *prima facie* case of discrimination, for example, that the grievor has been denied employment because of a group characteristic which it is alleged is a denial of equality of opportunity based upon *bona fide* qualifications in respect of his occupation or employment, the onus of proof shifts to the employer to show that it has reasonable cause to discriminate against the grievor for his group characteristic. Were it otherwise, the grievor (union) would be required to establish a cause for the denial of employment which would be difficult if not impossible under those circumstances where the management has terminated an employee without giving reasons.

From this he went on to suggest that there were two acceptable reasons for retirement on the basis of age as a b.f.o.q. The first was that the employee lacked the physical, mental or technical capacity to carry out his duties. He suggested that this must be proved on a balance of probabilities, but the employer had led no evidence in support of such a proposition. The second was⁵³

... where it can be shown that there was an unreasonable risk to the safety of the public or other employees because it was obvious that almost no one of that age could perform the work as safely as a younger person or because a significant number of persons of that age could not do so and they could not be identified individually by medical tests or other means. The issue of safety would require careful consideration with respect to certain types of hazardous employment such as police work, fire-fighting, airline pilots and so forth. But the onus is on the employer to demonstrate that simply by reaching the age of 65 the employee's capacity is reduced to the point where he cannot perform his duties in a manner that meets what is required by the standard of performance demanded by his employer and achieved by fellow employees of younger age.

Again the arbitrator observed that no evidence was led to show that the grievor's job performance "in any way adversely affected the interests of either his employer, fellow employees or the general public in the sense that by his age he instilled a lack of confidence in them in his capacity to safely carry out his duties".⁵⁴ Therefore, he concluded, the company had not shown that it had reasonable cause to refuse to continue to employ the grievor because the compulsory retirement policy at age 65 had not been shown to be a *bona fide* qualification in respect of the grievor's job duties.

It was necessary next for the arbitrator to consider the protection in section 8(3) of the *Human Rights Code* for "the operation of any term of a *bona fide* retirement, superannuation, or pension plan, or the terms or

⁵² *Ibid.*, 317-18.

⁵³ *Ibid.*, 319.

⁵⁴ *Loc. cit.*

conditions of any bona fide employee insurance plan, or of any bona fide scheme based upon seniority". However, he suggested that what the Legislature had in mind in providing this exception "was to allow for some distinctions to be drawn, based on age, in order to accommodate the actuarial requirements of various employee benefit plans and in order not to affect adversely the seniority concepts established in the law of the collective agreement, e.g. rights to recall after layoff".⁵⁵ He went on to suggest what the purpose of subsection (3) was, in the following terms:⁵⁶

The purpose of this subsection is simply to ensure that given a proper plan there may be distinctions or differentials in benefits which depend on age. If that were not the case the actuarial basis of such plans might be seriously affected and improper benefits might be provided. If s. 8(3) were interpreted as providing a protection to employers who established a policy the central basis of which is to "refuse to continue to employ" a person simply because he has reached a certain age, where age bears no objective relation to bona fide job qualifications, the protection provided by s. 8(1) would have no effect.

In conclusion, Arbitrator Weiler held that since the Association had violated section 8 of the *Human Rights Code*, in compelling the grievor to retire solely because he had reached the age of 65, this was contrary to the collective bargaining agreement, which provided that contraventions of the Code were to be avoided in the operation of the agreement. In any case, he asserted, it would not have been possible to decide otherwise because neither party to a collective agreement could contract out of the operation of the Code, both because of section 50 of the *Labour Code of British Columbia*⁵⁷ and because of judicial authority⁵⁸ that where a collective agreement is contrary to a statute, it is null and void to that extent.

On the other hand, it should be pointed out before concluding this Part, that the British Columbia Public Service Adjudication Board held, in *B.C. Government v. B.C. Government Employees' Union*,⁵⁹ that the provision on compulsory retirement in section 11 of the *Corrections Act*,⁶⁰ and the Regulations pursuant thereto, overrode section 8 of the *Human Rights Code of British Columbia*. Two reasons were given for this. The first was that the *Corrections Act* is a special statute, while the *Human Rights Code* is a general statute. The second was that while section 11 of the *Corrections Act* specifically provides that the compulsory retirement age could be prescribed by regulations "notwithstanding . . . any other Act", the *Human Rights Code* had no comparable provision. The second argument is convincing: the first is much more questionable. On the issue of the validity of a retirement age policy, the following two assertions in favour of giving

⁵⁵ *Ibid.*, 320.

⁵⁶ *Loc. cit.*

⁵⁷ S.B.C. 1973 (2nd Sess.), c. 122.

⁵⁸ *McLeod et al. v. Egan et al.*, [1975] 1 S.C.R. 517; (1974), 46 O.L.R. (3d) 150.

⁵⁹ (1980) 1 C.H.R.R. D/43.

⁶⁰ S.B.C. 1970, c. 10, amended S.B.C. 1977, c. 69, now R.S.B.C. 1979, c. 70.

primacy to the *Corrections Act*, accepted by the Board,⁶¹ seem highly dubious:

- (1) The *Corrections Act* is a special statute in the sense that it deals with a special subject matter.
- (2) The *Human Rights Code* is a general statute.

Surely, however, the "special subject matter" of a *Corrections Act* is corrections. The retirement age of the staff is important, but not central to the scheme. Retirement age is one of the crucial questions for anti-discrimination legislation, which includes age as a prohibited ground of discrimination. On that basis a bald assertion that "[t]he Human Rights Code is a general statute", without any explanation of how that conclusion is reached, must be considered questionable. The Human Rights Codes do not merely proclaim equality before the law, or equal protection of the laws, or equality of opportunity, in one clause. There are specific provisions with respect to specific fields of activity, like employment or the leasing of accommodation, in relation to each of which there are specific prohibited grounds of discrimination, on occasion varying with respect to the activity concerned. It is one thing to base the primacy of another statute on a clear "notwithstanding" clause (it emphasizes that other provinces should follow Alberta, Quebec and Saskatchewan in so providing in their Human Rights Codes), it is another merely to characterize it as "special" and dismiss a Human Rights Code as "general".

(3) Canadian Decisions Concerning Age Discrimination and Bona Fide Qualifications or Requirements

There have been some 23 boards of inquiry in Canada which have issued reports concerning complaints based upon age, or age and some other ground:

Alberta

MacKay v. Dominion Fruit Westfair Foods (1974)
Human Rights Commission v. Whitecourt Star (1976)
Human Rights Commission v. City of Edmonton and Edmonton Police Association (1976)
Gadowsky v. School Committee of the County of Two Hills, No. 21 (1979)

British Columbia

Burns v. Piping Industry Apprenticeship Board, Local 170 (1977)
Wilson v. Vancouver Vocational Institute (1976)
Hope v. Gray-Grant Western News (1980)

Canada

White v. The Queen (1980)
Arnison v. Pacific Pilotage Authority (1980)
Canadian Human Rights Commission v. Voyageur Colonial Ltd. (1980)

Manitoba

Derkson v. Flyer Industries (1977)

⁶¹ *Supra*, fn. 59, D/44.

Bedrich v. Winnipeg (1981); *Finlayson v. Winnipeg* (1981); *Newport v. Manitoba* (1981)

New Brunswick

Little v. Saint John Shipbuilding and Drydock Co. Ltd. (1980)

Nova Scotia

Goyetsche v. French Pastry Shop Ltd. (N.S., 1980)

Ontario

Britnell v. Brent Personnel Placement Services (1968)

Cosgrove v. North Bay (1976)

Hadley v. Missisauga (1976)

Hall and Gray v. Etobicoke Fire Department (1977)

Hawkes v. Brown's Ornamental Works of Belleville (1979)

Peterson and Carter v. Canadian Rubber Dealers Ltd. (1980)

O'Brien v. Ontario Hydro (1981)

Of the 23 cases listed above, only six will be discussed here, because eight⁶² were largely concerned with questions of credibility or other issues discussed elsewhere; six others⁶³ were largely concerned with jurisdictional or definitional issues; while two more⁶⁴ concluded that the basis of whatever discrimination occurred was not age.

⁶² *Britnell v. Brent Personnel Placement Services* (Ont., 1968) — a complaint that the respondent failed to refer because client wanted a "young" secretary, was sustained; *Wilson v. Vocational Institute* (B.C., 1976) — complaint of denial of access to school services available to the public, sustained; *Gadowsky v. School Committee of Two Hills* (Alta., 1979) — a complaint that a 64-year old school teacher, who had been given the option of retiring or transferring to one of a number of difficult or impractical teaching positions, was discriminated against on the basis of age was upheld. Chairman McLaren granted damages of equal to lost earnings for 2 years, minus part-time income earned, for a total of \$41,637.07, plus a further sum of \$24,699.99 if she were not hired for the following academic year, aff'd *Re Gadowsky*, [1981] 1 W.W.R. 647; *Hawkes v. Brown's Ornamental Iron Works* (Ont., 1979) — a complaint of a 51-year old woman welder was sustained; *Arnison v. Pacific Pilotage Authority* (1980), 1 C.H.R.R. D/138 (Can.) — the Human Rights Tribunal held that although regulations pursuant to the constituted "law" for the purposes of s. 14(b) of the *Canadian Human Rights Act*, the Pilotage Act authorized the setting of minimum, and not maximum, age qualifications for applicants for a pilot's licence, and so a regulation limiting eligibility to age 50 was invalid. In the course of his decision, Chairman Herbert also held that proof that a condition is a b.f.o.q. is on the employer who claims it; On appeal ((1980), 116 D.L.R. (3d) 736 (F.C.A.)), it was held that the regulations pursuant to the Pilotage Act were validly made, and prevailed over the C.H.R.A. due to s. 14. *Goyetsche v. French Pastry Shop Ltd.* (1980), 1 C.H.R.R. D/124 — the complaint was dismissed because the Board was convinced, on the evidence, that the respondent had financial difficulties and laid off the complainant because his work could be done by others, but he was not capable of performing the work of others; *Peterson and Carter v. Canadian Rubber Dealers and Brokers Ltd.* (Ont., 1980) — the complaint of a 52-year-old waitress was dismissed because the chairman decided that the facts did not support the allegation of discrimination. *O'Brien v. Ontario Hydro* (Ont., 1981) is discussed in Chapter XII under b.f.o.q.s.

⁶³ *H.R.C. v. Edmonton and Edmonton Police Association* (Alta., 1976); *H.R.C. v. Whitecourt Star* (Alta., 1976); *Burns v. Piping Industry Apprenticeship Board* (B.C., 1977) — see text accompanying fn. 4 for a more detailed discussion. *Bedrich*, *Finlayson*, and *Newport* (Man., 1981) are dealt with in Chapter XV.

⁶⁴ *MacKay v. Dominion Fruit Westfair Foods* (Alta., 1974) — where it was held that a policy of retiring women at age 60 and men at age 65 was discrimination on the basis of sex, not age; *White v. The Queen* (1980), 1 C.H.R.R. D/136 (Can.). Chairman Tetley held that the denial of severance pay to an employee who had worked for a Crown agency for less than 5 years prior to his retirement was not a distinction based on age but on years of service.

The most important issue regarding age discrimination that has arisen before the six Human Rights Tribunals to be discussed here has concerned the b.f.o.q. criterion. An even prior question, which has arisen in some of these hearings, has been whether the existence of a collective agreement and a regular industrial relations grievance procedure, whether previously resorted to or not, precludes a hearing concerning dismissal or retirement on the basis of age.

The decision which has provided the most detailed analysis of the second issue is that of a Manitoba Board of Inquiry in *Derkson v. Flyer Industries Ltd.* (1977). The Board was concerned with a complaint that the forced retirement of the complainant, who was a lathe operator, at age 65, constituted age discrimination.⁵⁵ A preliminary objection was taken to the jurisdiction of the Board on the basis that since a collective agreement existed, the matter of dismissal or retirement should have been dealt with under normal industrial grievance procedure. Since a Board of Arbitration under this procedure had rejected the grievance, the respondent argued that the Human Rights Board had no jurisdiction. However, the Board of Inquiry rejected this contention on the basis that the Board of Arbitration did not face the same issues; it dealt with the interpretation and enforcement of a collective agreement, while the Human Rights Board dealt with the *Manitoba Human Rights Act*. Chairman London, after a very detailed review of the law and facts, held that the defences of *res judicata* or issue estoppel did not apply because neither the issues nor the parties, nor even the remedies were identical before the two boards. In any case, he also declared (p. 29):

I prefer primarily to rest my conclusion on the general foundation . . . that the Human Rights Act is extraordinary legislation the operation or enforcement of which cannot be precluded by the actions of individuals.

He turned, then, to the merits and, referring to the fact that the only factor taken into account in compelling the complainant to leave his employment was age, he stated that this raised a *prima facie* case of age discrimination. This, in turn, shifted the onus on to the employer to show that, nevertheless, no contravention of the *Human Rights Act* had occurred because the retirement based on age was either (1) a reasonable occupational qualification and requirement, or (2) exempted by section 7(2) of the *Human Rights Act*, which provides:

No provision of section 6 or of this section relating to age prohibits the operation of any term of a bona fide retirement, superannuation, or pension plan, or the terms or conditions of any bona fide group or employee insurance plan or of any bona fide scheme based upon seniority.

On the matter of the first defence, he suggested that it might apply in only two circumstances (p. 38):

⁵⁵ It should be noted that Manitoba, like New Brunswick, does not specify a maximum as coming within the definition of age. This was specifically noted by Chairman London and also by Hamilton, J. in the McIntire case referred to in fn. 5, *supra*.

The first is that case where the individual by virtue of his age alone does not have the physical, mental or technical capacity to carry out his duties as an employee. It would be incumbent upon an employer who sought to set up this exception as a defence to demonstrate by convincing evidence that one can infer in the particular circumstances that age alone would render an employee physically, mentally or technically incapable of performing his duties. No such evidence was presented at this hearing. The second case in which the exception might be set up as a defence would be where it can be shown that the public or other persons might be adversely affected or harmed because the very age of the employee might make it obvious he could not as safely perform his duties as would someone younger in age. This might be the case in certain types of hazardous employment where the safety of the employee himself was in question or in employment where the lives of the public were at stake and some special skill was required, for example airline pilots or operators of motor vehicles. Once again, however, substantial evidence would have to be adduced by the employer to demonstrate the incapacity or reduced capacity occasioned by the age of the employee. In the present case no such evidence has been adduced nor, is it likely that such evidence could have been adduced.

As to the defence of a bona fide benefit plan, Chairman London first considered the allegation that the information concerning the terms of the retirement plan had not been communicated to the employee, but suggested that the bona fides did not depend on that kind of communication unless it could be shown that it had been deliberately withheld. In any case, where the union representing the employees is aware of the terms, that would be sufficient communication. On the second allegation, i.e. that some employees had been kept on past the retirement age of 65 and that this amounted to arbitrariness or discrimination, he responded that he would have found that the plan was not bona fide on this basis but that he had decided that that was not the crucial issue. Rather, he suggested (p. 43):

It is my opinion that the exception provided . . . was enacted, albeit in very vague and ambiguous terms, to allow for distinctions to be drawn, based on age, in order to accommodate the actuarial requirements of various employee-benefit plans and in order not to affect adversely the seniority concepts established in labor law and practice, e.g. rights to recall after lay-off.

He asserted that this exemption did not "speak to the issue of retirement age".

He indicated that he came to this conclusion for the following reasons. First, since the wording of the exemption was "so vague and indefinite", he applied the provision in the *Interpretation Act* which states that "every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its object" and suggested that since the remedial features of the *Human Rights Act* are obvious, "it should be construed liberally in order to provide the widest possible protection against discrimination except in those cases where its terms of exception are absolutely clear and unambiguous" (pp. 43-4). Second, he concluded that "[t]he purpose of the subsection is simply to ensure that given a proper plan there may be distinctions or differentials in benefits which depend on age", because "[i]f that were not the case the actuarial basis of such plans might be seriously affected and improper benefits might be provided" (p. 44). His third reason was that the provision

of the *Human Rights Act*, guaranteeing to every person the right of equality of opportunity, based upon bona fide qualifications in respect of employment, "would be rendered totally ineffective if an employer could establish a policy the central basis of which is to refuse to employ or continue to employ an individual simply because of his or her age" (p. 44). The only exception to the proposition that age could not be a factor in employment decisions was with respect to occupational qualifications. If the Legislature had otherwise desired to restrict equality of employment opportunity on the basis of age, he suggested, it would have used more precise terms than those concerning retirement plans. He therefore concluded (p. 46):

The effect of subsection (2) of section 7 of the Act . . . must refer simply to differentials in the nature or amount of benefits receivable by an employee under the types of plans or schemes referred to therein. The 1976 amendment to the subsection,⁶⁶ therefore, clarified the law but did not change its substance in this respect.

In the result, the Chairman found that the respondent had contravened the *Human Rights Act* by retiring the complainant simply because he had reached the age of 65.

Three of the leading cases in Canada on the issue of age discrimination, particularly concerning the "bona fide occupational qualification and requirement" criterion in the *Ontario Human Rights Code*, are *Hadley*, *Cosgrove* and *Hall and Gray* — the first two heard by Boards of Inquiry in 1976 and the last-mentioned, in 1977. All three involved firefighters forced to retire at age 60. The requirement arose from largely similar sources in each of the cases. In the *Hadley* case it arose out of a by-law of the City of Mississauga and a resolution of the City Council. In the *Cosgrove* case it was also pursuant to a by-law of the City of North Bay, enacted to reflect the terms of a collective agreement between the City and the trade union representing the firefighters. In the *Hall and Gray* case the basis for the retirement policy was also a city by-law based on a collective bargaining agreement with the firefighters' union and, in that case, the union local was added as a party respondent. In both the *Hadley* case and the *Hall and Gray* cases, the Board of Inquiry upheld the allegation of discrimination based upon age, and rejected arguments based upon "bona fide occupational qualifications". In the *Cosgrove* case the Board of Inquiry rejected the complaint on the basis that the age requirement was a "bona fide occupational qualification". Since the *Hadley* decision was the earliest and

⁶⁶ Since the events he dealt with occurred in 1975, he dealt with the pre-1976 version of this provision. In 1976 it was changed to read:

"No provision of section 6 of subsection (1) shall prohibit a distinction on the basis of age, sex, family status or marital status

(a) of any employee benefit plan or in any contract which provides an employee benefit plan, if the Commission is satisfied on the basis of the guidelines set out in the regulations that the distinction is not discriminatory or that the employee benefit plan can be provided only if the distinction is permitted; . . ."

Chairman London had pointed out earlier in his judgment that by this new provision the respondent would have had no better argument as there was no evidence of a Commission approval.

by far the longest and most carefully reasoned of the three and since, in addition, the Board of Inquiry in the *Hall and Gray* case based its decision largely upon the *Hadley* case, the *Hadley* case is the one that will be discussed first.

In considering, as an initial issue, the b.f.o.q. defence, Chairman Lederman referred, at some considerable length, to two of the leading authorities in the United States mentioned above, i.e. the *Hodgson* case⁶⁷ and the *Weeks* case,⁶⁸ and held that the burden of proof to establish the defence rested with the employer. As to the factors to be considered in assessing the bona fides of the age qualification, he relied upon the *Hodgson* case to suggest the following: (1) jeopardy to the public safety; (2) an evaluation of the testimony regarding a person's "functional" age, i.e. his ability and capacity to do the job, rather than his chronological age; and, (3) the practicality of scrutinizing the continued fitness of employees on a frequent and regular basis. Based upon these factors, Chairman Lederman reached a number of conclusions.

First, although there was some evidence to indicate that the job was strenuous and perhaps dangerous, he felt that the respondent city had not adduced "a scintilla of evidence to show that a person undergoes substantial degeneration either physically or mentally as a result of the aging process so as to prevent him from adequately performing his tasks as a fireman" (p. 19). He remarked that, considering the resources available to the respondent, it was remarkable that the respondent had failed to adduce such evidence, even if it existed. In the case before him the evidence was that the complainant himself was in good health and had undergone a complete medical examination. Moreover, it was admitted by a witness for the respondent that one of the most essential qualities of a shift captain, which was the occupation of the complainant, was his leadership ability and that on this criterion there was no necessary relationship with age. Furthermore, no evidence was adduced by the respondent to show that it would be logically impossible to test fire fighters for mental and physical skills. The Chairman felt that special job-related examinations could be designed and that the respondent city had presented no evidence as to why it could not do so. Based upon all these factors, he concluded "that the Respondent City has not discharged the burden of proof resting upon it and therefore has not shown that age is a *bona fide* occupational qualification of the job of Shift Captain" (p. 12).

Next, Chairman Lederman considered an argument based upon difficulties with the Ontario Municipal Employees Retirement System, which provided that although the normal retirement age of members was 65 years, where an employer filed a certificate stating that policemen or firemen were entitled to retire at the age of 60, then the normal retirement age of such a member was to be age 60. However, Chairman Lederman, after analysis of the requirements, concluded that the word "normal" was used to define pension age or retirement age, but did not warrant a

⁶⁷ *Supra*, fn. 22.

⁶⁸ *Supra*, fn. 20.

construction of the term "normal retirement age" to mean "compulsory retirement age" (pp. 15-16). Thus, the plan merely contemplated retirement at age 60 at the employee's option, without affecting the pension plan. Since there was, under *The Ontario Human Rights Code*, a provision (s. 4(9)) to the effect that "any bona fide insurance plan" is not to be affected by the requirement of non-discrimination, Chairman Lederman interpreted this as permitting employers, for the sake of such plans, "to discriminate against older employees by not enrolling them in the pension or retirement plans, or by providing reduced benefits due to fewer years of employment" (p. 17). Otherwise the cost of such plans would discourage employers from adopting or retaining them. In this way, the Code does not condone compulsory retirement before the age of 65, even if tied to a pension plan, but merely permits discrimination with respect to participating in, and the benefits accruing from, the plans. Therefore, he concluded that the pension plan did not prescribe a mandatory retirement date in conflict with *The Ontario Human Rights Code* (p. 19).

Third, he went on to hold that the employee concerned could not contract himself out of his protection under *The Ontario Human Rights Code*. He concluded that this had to be the rule on the same basis that courts will not generally enforce a contract which is expressly or impliedly prohibited by statute (p. 25).

Fourth, in response to the argument that the matter should have been dealt with in the usual labour relations context as a grievance (a grievance had in fact been filed at about the same time as the filing of the complaint), he replied, as had the Manitoba Board in the *Derkson* case, discussed earlier, that under the circumstances there was no reason why the Human Rights Inquiry should defer to an arbitration proceeding. Moreover, he felt that the arbitrator should defer to the human rights proceeding for the following reasons (pp. 28-32): (1) The parties before an arbitration proceeding are the employer and the labour organization, and not the individual employee. The interests of the individual and those of his union might not be identical, particularly in the light of pressures by the labour movement for mandatory retirement at an early age, coupled with an adequate pension. On this point he quoted from Professor Baum, in his book *The Final Plateau*:²⁹

... [T]here are no powerful interest groups working in favour of the older employee. What perhaps should have been the natural ally of the older worker, the trade union, is more concerned with meeting its concept of full employment, coupled with a decent income.

(2) The initiation and argument in an arbitration hearing is that of the company or the union, rather than the grievor. The main recourse of the dissatisfied grievor is to charge the union with a breach of its duty of fair representation, but the courts are extremely reluctant to interfere with the discretion of unions in their handling of grievances. (3) The authority of an arbitrator is to interpret collective bargaining agreements and so he must restrict himself to the contract in interpreting a phrase such as

²⁹ Toronto: Burns & MacEachern, 1974, 157.

"discriminatory action" which appears in the collective bargaining agreement. This interpretation might not be exactly in accord with that given by various courts or boards to the word "discrimination" under *The Ontario Human Rights Code*. (4) An arbitration proceeding in the labour context is essentially a private proceeding tailored to meet the needs of the contracting parties, whereas a proceeding under *The Ontario Human Rights Code* before a board of inquiry must be held in public and the parties are entitled to the full procedural protection afforded by *The Statutory Powers Procedure Act*. The application of *The Ontario Human Rights Code* is a matter of public importance and should not be submerged in the labour arbitration process in which the arbitrator's function is essentially to monitor private agreements. (5) The Ontario Legislature had specifically chosen the board of inquiry under *The Ontario Human Rights Code* to adjudicate complaints of discrimination. (6) There are full rights of appeal under *The Ontario Human Rights Code*, whereas a decision of an arbitrator is subject only to judicial review. For all these reasons Chairman Lederman refused to defer to an arbitrator under the collective agreement.

By way of remedy he decided that the City of Mississauga should pay in compensation to the complainant his salary for the period commencing with his forced retirement to the day of the hearing, less whatever he had received or would have received in pension benefits during that period, together with the contributions that he would otherwise have made to the pension scheme had he continued his employment. Second, he ordered the City of Mississauga to reinstate the complainant as a shift captain, subject to the condition that he still possessed the "requisite physical and mental powers to perform his necessary duties".

In the same year, the Board of Inquiry in the Cosgrove case upheld the contention of the City of North Bay that enforced retirement at age sixty was a "bona fide occupational qualification and requirement" for firefighters, including the position of Fire Prevention Officer. It should be noted that Chairman Mackay in this case did not appear to be applying any criteria different from Chairman Lederman's, although his discussion of the applicable law was brief. What he did, instead of reviewing judicial or quasi-judicial decisions, was to turn to dictionary definitions and apply these to the limited evidence before him. Since, as will be indicated hereafter, two Divisional courts and the Court of Appeal have approved his interpretation, it will be set out in full (pp. 12-13):

The issue, simply stated, is whether a mandatory retirement age of sixty, regardless of a particular individual's ability, capacity or competency, is a bona fide occupational qualification and requirement for the position or employment of a fireman within the meaning of sec. 4(6) of the Human Rights Code.

"Bona fide" is the key word. Reputable dictionaries whether general (such as Oxford and Webster) or legal (such as Black) regularly define the expression in one or several of the following terms, viz., honestly, in good faith, sincere, without fraud or deceit; unfeigned, without simulation or pretense, genuine. These terms connote motive and a subjective standard. Thus a person may honestly believe that something is proper or right even though, objectively, his belief may be quite unfounded and unreasonable. Applying this solely subjective

standard I have no doubt whatsoever that the Corporation in enacting by-law 2085 and negotiating the collective agreement upon which it is founded were acting honestly, as opposed to maliciously, deceitfully or for some oblique or ulterior purpose in disguise.

However, that cannot be the end of the matter or the sole meaning to be attributed to "Bona fide" for otherwise standards would be too ephemeral and would vary with each employer's own opinion (including prejudices), so long as it is honestly held, of the requirements of a job, no matter how unreasonable or unsupportable that opinion might be. Thus an airline may sincerely feel that its stewardesses should not be over 25 years of age. However if it requires such a limitation as a condition of employment or continuing employment I would have no doubt that such limitation would not qualify as a *bona fide* occupational qualification or requirement under the exemption created by sec. 4(6). Why? Because, in my opinion, such a limitation lacks any objective basis in reality or fact. In other words, although it is essential that a limitation be enacted or imposed honestly or with sincere intentions it must in addition be supported in fact and reason "based on the practical reality of the work a day world and of life" (adopting the words of Mr. O'Neill in his summation).

Using this interpretation, he referred to the views of four firefighters and fire chiefs (pp. 8-9):

Without exception these gentlemen agreed that the job of a Fire Prevention Officer is a hazardous one, imposing considerable physical and mental stress, albeit perhaps not as much as fire fighting itself. Further they testified that although there was no concrete or explicit medical findings available as proof it was their collective opinion based on years of experience and observation that firemen deteriorate or slow down in performance, and are less capable of coping with the exigencies and urgencies of their employment as they approach or pass the age of sixty. They conceded that the foregoing observation is a general rule and that particular individuals might well be able to perform their duties past the age of sixty just as there would be instances of even younger men being unable to do so. All in all, however, they felt that age 60 was an appropriate "rounding-off" figure to define the safe limits of employment in the interests of the individual himself and of his fellow workers who rely upon him to measure up and pull his weight.

And so, although Chairman Mackay accepted as a fact that (p. 10):

... there was no evidence that Mr. Cosgrove was unfit to continue, but rather the evidence was to the contrary, nor indeed was there any medical evidence in support of a compulsory retirement age of 60 as a *bona fide* occupational qualification and requirement for the position of municipal firefighter in respect of the physical and mental requirements for the position, and this lack of medical evidence was conceded by the witnesses.

he nevertheless concluded (p. 13):

In my view the age 60 mandatory retirement provision imposed by by-law 2085 satisfies both aspects of the word "bona fide". It is a condition honestly imposed and, on the basis of the evidence of the Corporation's witnesses, which I accept, it is a condition which reasonably and properly can be imposed in the special context of firefighters.

As suggested earlier, there does not appear to be any difference between the Cosgrove and the Hadley cases on the basis of the applicable principles.

but rather on the basis of the weight given by each chairman to the evidence presented. In any event, the *Cosgrove* definition and finding of fact were upheld by the Divisional Court⁷⁰ and by the Court of Appeal.⁷¹ In the Divisional Court Hughes, J. had this to say:⁷²

Nevertheless the learned Inquiry Officer's finding that the mandatory retirement provision was a *bona fide* occupational qualification and requirement for Cosgrove's employment was a finding of fact. . . . It was he who heard the evidence and under the circumstances was the only authority capable of judging the good faith of the assertions made before him. . . . Such a finding which, in my view, he was entitled to make, should not be disturbed and I would dismiss the appeal, allowing the respondent municipality its costs.

The Court of Appeal was even more concise in dismissing the appeal, even without calling counsel for the Commission, because there was agreement with the Divisional Court "that there was evidence upon which the Board of Inquiry could reach the conclusion that he did".⁷³ Mr. Justice Arnup, who gave the reasons of the Court of Appeal, also stated that the Court agreed "with the test of *bona fides* as stated by the board of inquiry".⁷⁴

The *Hall and Gray* case came a year after the above two and the Board of Inquiry followed the reasoning in the *Hadley* decision in concluding that discrimination had been proved. As in the *Hadley* and *Derkson* cases, Chairman Dunlop refused to defer to an arbitrator under grievance procedures. On the main issue, as in the *Cosgrove* case, he grappled with the necessity of defining "*bona fide*" for the purposes of the Ontario Code's b.f.o.q. and r. (p. 5):

One of the first things the board must determine is the meaning of the expression "*bona fide*" as applied to an "occupational qualification and requirement" in the context of an anti-discrimination statute. One of the objectives of the Code is to ensure that people in the age range forty to sixty-four, who in the past often have been discriminated against in respect of employment opportunities, are not prevented from working simply because they are believed to be too old. If they are to be prevented from filling available jobs it must be because they have shortcomings apart from age. The exception in s. 4(6) recognizes that for some jobs people from forty to sixty-four *may* be too old. The meaning of "*bona fide*" that seems most consistent with this objective would be "real" or "genuine" i.e. that there is a sound reason for imposing an age limitation, and the onus of establishing this justification for discrimination is on the person alleging it to be justified.

Chairman Dunlop concluded that since there was evidence to the effect that some firefighters lost their capacity to do their work even before reaching the age of 60, with certain physical processes slowing down starting in the thirties, and that since no tests had been developed for determining the capabilities of firefighters to continue to perform effectively and safely, "it

⁷⁰ *Re Ontario Human Rights Commission and City of North Bay* (1977), 17 O.R. (2d) 712; 81 D.L.R. (3d) 273.

⁷¹ (1977), 21 O.R. (2d) 607; 92 D.L.R. (3d) 544.

⁷² *Supra*, fn. 70, O.R. at 716; D.L.R. at 277-78.

⁷³ *Supra*, fn. 71, O.R. at 608; D.L.R. at 544.

⁷⁴ *Loc. cit.*

is difficult to see how one could say with any confidence that the age of sixty was a point beyond which a sufficiently high proportion of firefighters could no longer perform effectively and safely as to make retirement at this age a *bona fide* condition and requirement of a job" (p. 6). He felt that there was no scientific or statistical evidence before him to prove that beyond the age of 60, firefighters became less effective and less safe. He asserted that the main reason presented in the evidence was the impressionistic one that firefighting was a "young man's game", but no precise evidence in support of this proposition was presented. With references to both the *Hodgson* case in the United States and the *Hadley* case in Ontario, Chairman Dunlop concluded that the allegation of discrimination was substantiated and the b.f.o.q. was not proved.

By the time his report was submitted, however, the above-mentioned decisions of the Divisional Court and the Court of Appeal in the *Cosgrove* case had also been rendered, therefore, an application was made to Chairman Dunlop to reconsider his findings in the light of those decisions, especially that of the Court of Appeal. In response to this, Chairman Dunlop insisted that there was not "a significant inconsistency between the test as enunciated in my earlier reasons and that propounded by Professor Mackay". Later, referring to Professor Mackay's definition of "bona fide", Chairman Dunlop summed up:⁷³

While Professor Mackay stresses honesty and sincerity whereas I focussed on reality or genuineness I think we were both getting at the same concept. We were recognizing that scientific certainty was not required but that whim or prejudice was not enough. I am not aware of what evidence Professor Mackay heard. According to the evidence I heard, as I indicated in my earlier reasons "the Etobicoke decision was based largely on the view that, like shorter working hours and higher pay, early retirement appealed as a desirable benefit of a rigorous job". I was not persuaded that the collective bargaining which led to the by-law making retirement compulsory at age 60 was motivated by any belief that, beyond the age of 60, there was any particular increase in the hazard either to the firefighter or to the public in allowing the firefighter to continue to work. While efforts were made at the hearing to justify the by-law on this alternative ground, my conclusion was that "while these are all sound reasons for allowing a firefighter to retire at the age of 60 they do not seem to me to be reasons for compelling it."

From these two decisions of the Board of Inquiry the Borough of Etobicoke appealed to the Divisional Court.^{73a} The Divisional Court referred to the three judgments in the *Cosgrove* case, reviewed the two decisions of Chairman Dunlop and, by a two to one majority, allowed the appeal. Despite the clear affirmation by the Divisional Court, in the *Cosgrove v. North Bay* case, that the determination by the Inquiry Board

⁷³ Cited in *Borough of Etobicoke case, infra*, fn. 75a, O.R. at 320-1; D.L.R. at 686.

^{73a} *Re Borough of Etobicoke and Ontario Human Rights Commission et al.* (1979), 26 O.R. (2d) 308; 104 D.L.R. (3d) 674. An appeal was dismissed by the Court of Appeal and Jessup, J.A. cited the reasons given by O'Leary, J. in the Divisional Court as grounds for the dismissal, (1980), 29 O.R. (2d) 499. Leave to appeal to the Supreme Court of Canada was granted November 3, 1980.

concerning the b.f.o.q., "was a finding of fact" and that since it was the Chairman who heard the evidence, "under the circumstances . . . [he] was the only authority capable of judging the good faith of the assertions made before him" and so "[s]uch a finding which . . . he was entitled to make, should not be disturbed".⁷⁶ Mr. Justice O'Leary proceeded to do just that.

In his judgment O'Leary, J. fused the two parts of the *Mackay* test, approved of both by another Divisional Court and the Ontario Court of Appeal. He criticised Chairman Dunlop for not having "put his mind at all to the question of whether the Borough in agreeing to the age limitation acted honestly and with sincere intentions", when there is no evidence that the Board Chairman ever questioned the honesty or sincerity of the Borough's intentions; rather, he placed the emphasis on the second branch of the *Mackay* test, namely an "objective basis in reality or fact". Although it is true that Chairman Dunlop did suggest that the Borough's view "that firefighting is a 'young man's game'" was not based on "any scientific conclusion that there was a significant increase in the risk to individual firefighters, to their colleagues or the public at large in allowing firefighters to work beyond the age of sixty", it is not fair to say, as O'Leary, J. did, that he was thereby "requiring the employer to do far more than to show that the age limitation was supported in fact and reason based on the practical reality of the workaday world".⁷⁷ Perhaps asking for a "scientific conclusion" or a "medical justification" is more exacting than evidence based on "the practical reality of the workaday world", but is unsupported evidence, consisting of impressions and opinions sufficient, even when presented by veteran employees? After all, such witnesses are not disinterested! O'Leary, J. referred to the fact that the "elaborate briefs" of firefighters "as to why retirement at age sixty should be required" were "strong evidence that mandatory retirement at age 60 is a *bona fide* occupational requirement for fire-fighters",⁷⁸ but if so, surely some of that evidence from some of those briefs must have been available to the Borough. If so, why was it not submitted? If no evidence beyond opinions and impressions was submitted on behalf of the respondent, should not the majority in the Divisional Court have followed Cory, J., who dissented, and taken the same position as the Ontario Court of Appeal in the case of *Cosgrove v. North Bay*, i.e. defer to the Board of Inquiry in its finding of fact? All of the other authorities in the United States, in Ontario itself, and in other parts of Canada, affirm that *some* evidence beyond opinion should be required.

Before closing this Part, reference should be made to decisions given after those discussed above with respect to the three firefighter cases in Ontario. The earliest of these is a decision of O'Byrne, J. of the Alberta Court of Queen's Bench in *Gerlitz v. City of Edmonton and International Association of Firefighters Local Union 209*.⁷⁹

⁷⁶ See *supra*, fn. 70, O.R. at 716; D.L.R. at 277-8.

⁷⁷ *Supra*, fn. 75, O.R. at 316; D.L.R. at 682.

⁷⁸ *Ibid.*, O.R. at 317; D.L.R. at 683.

⁷⁹ (1979), 11 Alta. L.R. (2d) 176.

The plaintiff was a firefighter compelled to retire at age 60 under the provisions of a collective agreement and a pension plan agreement. He brought action for damages for wrongful dismissal. The action was dismissed. Without reference to any of the court or tribunal authorities anywhere, without any definition being provided of the expression "bona fide", despite accepting medical evidence "that the plaintiff for his age was an extremely fit, lean man and had a physical work capacity of a man 40 to 49 years of age based on equivalent Canadian data", despite an observation "of him in the courtroom that he would still be able to carry out his duties" and despite medical opinion that "testing of a firefighter could be done for approximately \$100 per man and that the testing would be effective",⁸⁰ O'Byrne, J. opined that "the age of 60, which applies to all ranks is not an unreasonable age as a general rule".⁸¹

O'Byrne, J. did make reference to the fact that briefs submitted by the firefighters in the collective bargaining process with respect to the occupation of their members were filed at the trial, but the judgment does not indicate what those briefs contained. Presumably there was evidence there to lead him to assert:⁸²

Police work and firefighting are special occupations. They are treated in a special way, and they are similar to each other from the point of view of health and hazards. Firefighting is a young man's job; it is a hazardous occupation.

He referred to one witness and then stated that he accepted the "evidence of the defendants as to the reasons for a compulsory retirement":⁸³

There is no doubt that it is desirable and that in this instance it was achieved legally, fairly and properly in the collective bargaining process. It was in the best interests of the firefighters and the public as well. Many reasons are advanced, and they include some of this thinking — that there should be a general rule and that it should not be unreasonable or unfair. And it is conceded, of course, that such a general rule can affect some individuals unfairly. But what it does do is to keep a young and stable fire department. It provides equal treatment for all if it is mandatory. From the administrative point of view — and this is not of any great account, but it is of some note — it does help the administration of a pension plan, from the point of view of actuarial calculations, investment and so on. What is important is that it does insure jobs for younger men who are generally more capable. As I said, firefighting is not an older man's job.

His conclusion was, therefore:⁸⁴

I find that the occupational qualification is bona fide. It has to do with health of firefighters, it has to do with the hazards of the occupation, and, of course, the efficiency of the fire department, which is of great interest to the public. There is in my view no reason to test the individual or to base the age arrived at on scientific or statistical data. I prefer to accept the opinions of those who are on the front line, namely, the firefighters, that this is a desirable age.

⁸⁰ Ibid., 178.

⁸¹ Ibid., 180.

⁸² Ibid., 178.

⁸³ Ibid., 179.

⁸⁴ Ibid., 180.

One is led to conclude, based upon the decisions of the Ontario Divisional Court in the case of *Hall and Gray v. Borough of Etobicoke* and of the Alberta Queen's Bench Court in *Gerlitz v. Edmonton* that, despite a retirement age of 75 for judges, there is no great difficulty in convincing them that for firemen it should be 60.

One of the most recent decisions concerning an allegation of age discrimination, due to a compulsory retirement policy, is that of a New Brunswick Board of Inquiry in *Little v. Saint John Shipbuilding and Drydock Company* (1980).¹⁵ The complainant in this case had worked for the respondent company for many years as a crane operator. As he approached his 65th birthday he was informed that he would have to retire upon turning 65. He objected and was allowed to continue working for one month after his birthday, at which point he was retired. At the hearing into the allegation of age discrimination, the Commission and the complainant objected to the jurisdiction of the Board to hear evidence with respect to the existence of a b.f.o.q. This was based upon the fact that section 3(5) of the New Brunswick *Human Rights Code* provides, as a defence to an allegation of age discrimination, "a bona fide occupational qualification as determined by the Commission". The Board ruled that it did have jurisdiction to hear evidence with respect to the existence of a b.f.o.q. However, the Board subsequently determined, in its decision on the merits, that the effect of this provision in the New Brunswick Code was to require an employer to apply to the Commission to have a job requirement assessed as to its bona fides before implementing it. Failure to make such application and to receive such authorization, the Board suggested, meant that anyone against whom the requirement is issued has been discriminated against even if the requirement is subsequently determined by the Commission to be a b.f.o.q. The Board did suggest that if this were to happen, then the tribunal dealing with the particular complaint would obviously reduce the penalty against the employer.

In any case, despite indicating that the determination of the b.f.o.q. was within the jurisdiction of the Commission, the Board proceeded to discuss what is a b.f.o.q. It considered the evidence of a gerontologist, who testified that age 65 was not necessarily a key turning point in the abilities of people to do their jobs and that an individual's physical capacities could be determined by testing. The Board also made reference to the fact that the complainant had been allowed to continue his job for a month after reaching age 65 as an indication that that age was not a "magic number" where all one's facilities ceased to function.

In his discussion of what could be a b.f.o.q., Chairman Bruce made reference to the Ontario Inquiry Board decisions, discussed above, to indicate that one criterion is whether there is any prediction, with respect to such jobs as that of firefighting, that the employee would be able to meet the minimal acceptable functional requirements at all times or whether there would be an added risk to public and personal safety because of the greater likelihood of suffering health problems during the performance of a job. If it

is the latter, then the minimally accepted functional requirements of the job might not be met. On the other hand, if the performance of the job did not involve any safety risk to the individual or to the public, then normally a person should be able to continue in the job, or to be hired into a job, until or unless there is demonstration, through performance or testing procedures, that the individual is unable to perform the minimally acceptable functions of the job. He made reference to firemen, policemen, airline pilots and bus drivers as being subject to the following test (p. 13):

Because of the potentially dangerous nature of their jobs, it is argued that the employer cannot wait until they fall below the minimally acceptable performance level in their job. If it can be shown that the likelihood of an individual over a certain chronological age not meeting that acceptable performance level is too great (and what is too great will depend upon individual circumstances), then the employer must be able to discriminate against that individual on the basis of his chronological age. In the circumstances of that situation a *bona fide* occupational qualification could be said to exist.

He suggested that if medical tests were available, which could be administered on a regular basis and which could measure one's ability to perform a job in such a way that any decrease in the acceptable performance level can be accurately predicted, there would be no need to use chronological age as a basis for terminating employment or refusing to offer it. In the absence of medical tests, statistical evidence might be considered.

He went on to suggest that problems in determining whether there was age discrimination arise more with retirement than with hiring. This is because it is easier for an employer to show that the person hired was better qualified to function and perform the job than another who is not hired than it is for an employer who retires an employee who has been adequately performing the job to show that the retirement is for b.f.o.q. reasons.

Based upon all of these factors, and keeping in mind that in New Brunswick, as in Manitoba, the Code does not specify a maximum protected age, Chairman Bruce concluded that the enforced retirement in this case was a discriminatory action based upon age and not upon a b.f.o.q.: "The respondent was simply enforcing its company policy that *all employees* must retire at the age of sixty-five regardless of the nature of their jobs" (p. 19). Nevertheless, having come to the conclusion that in New Brunswick a b.f.o.q. is "as determined by the Commission" and that this could be done even after a finding of discrimination, the Board of Inquiry recommended reinstatement, subject to medical tests determining whether the complainant could continue to perform his functions as a bridge crane operator and, if not, alternative employment as well as back pay from the date of his retirement.

The best way to conclude this chapter and to sum up is to discuss the most recent decision of a hearing tribunal concerning the matter of age, rendered on December 10, 1980, in the case of *Canadian Human Rights Commission v. Voyageur Colonial Limited.*¹³² The Commission's

complaint, under section 10 of the *Canadian Human Rights Act*, combined with the respondent's written admission, produced the issue in question as being one concerning the refusal of the respondent to consider the initial hiring, as bus drivers, of individuals who are over the age of 40. The respondent readily admitted this personnel practice, but argued that this was not discriminatory, but rather a *b.f.o.r.* within the meaning of paragraph 14(a) of the *Canadian Human Rights Act*.

Chairman Abbott started his judgment by asserting that, as a result of the admission of the practice, the onus was on the respondent to establish that the refusal was a *b.f.o.r.* To meet this onus the respondent submitted eight arguments (pp. 5-6), which the Chairman reformulated into the following six questions (pp. 6-7):

- (1) Is the nature of the respondent's operations, involving inter-city bus driving, such as to require certain psychological characteristics of its bus drivers?
- (2) Do a beginning driver's low seniority and his functioning under the spare board system result in sources of stress?
- (3) Does the ability to cope with these sources of stress decrease with age?
- (4) Is there a danger to public safety if these stresses are not coped with successfully?
- (5) Was the respondent obliged to attempt to eliminate potential bus drivers who might not cope with these stresses?
- (6) Did the respondent establish the 40-year-old upper limit as a bona fide test of ability to cope, with a direct relationship to the practical realities of the bus driver's work?

He suggested that if the answer to each of these questions were positive, then it would follow that the respondent's practice was a *b.f.o.r.* and not a proscribed discriminatory practice.

The Chairman asserted that "the physical capacity of beginning bus drivers is not in issue" (p. 7). Rather, he suggested (p. 8):

What I am concerned with here is the somewhat more difficult assessment of whether age has a sufficient bearing on the ability to cope with the stresses of the early years of employment as a bus driver with the Respondent to justify the non-hiring of individuals beyond a certain age.

Because of stating the issue in that fashion, nearly all of the evidence which was presented to the hearing tribunal and which concerned measuring of physical capacity, was held to be irrelevant, even though the chairman was prepared to conclude that "from the evidence before me . . . physical capacity can be measured in relation to the work to be performed" (p. 8). Therefore, he asserted, despite the qualifications of the witness for the Commission, since his evidence related "to the physiology of job performance, the physical aspects", that was not the issue before the tribunal (p. 28).

He proceeded to adopt the definition of *bona fides* propounded by

Chairman Mackay to the *Cosgrove* case. Applying this two-part test, Chairman Abbott concluded, with respect to the subjective test — connoting honesty, good faith, sincerity, etc. — that (p. 29):

... [T]here is no evidence whatever that the Respondent's adoption of the 40-year age limit was a method of achieving some ulterior purpose or was anything else but the means of carrying out its expressed intent of protecting public safety. I find that the Respondent's employment practice was *bona fide* in the subjective sense expressed by Professor Mackay.

With respect to the objective test, Chairman Abbott accepted the following "practical realities" as having been established (p. 30):

- (1) that a newly hired bus driver with the Respondent has to cope with the stresses of low seniority and the spare board system in the interests of the safety of the travelling public; and
- (2) that the ability to cope with these stresses decreases with age and is especially low in middle age, i.e. after the age of 40.

At this point he referred (p. 31) to the *Hodgson* case in the United States Court of Appeals** for the proposition that "the burden of proof resting on the employer accused of discrimination is lighter where public safety is involved".

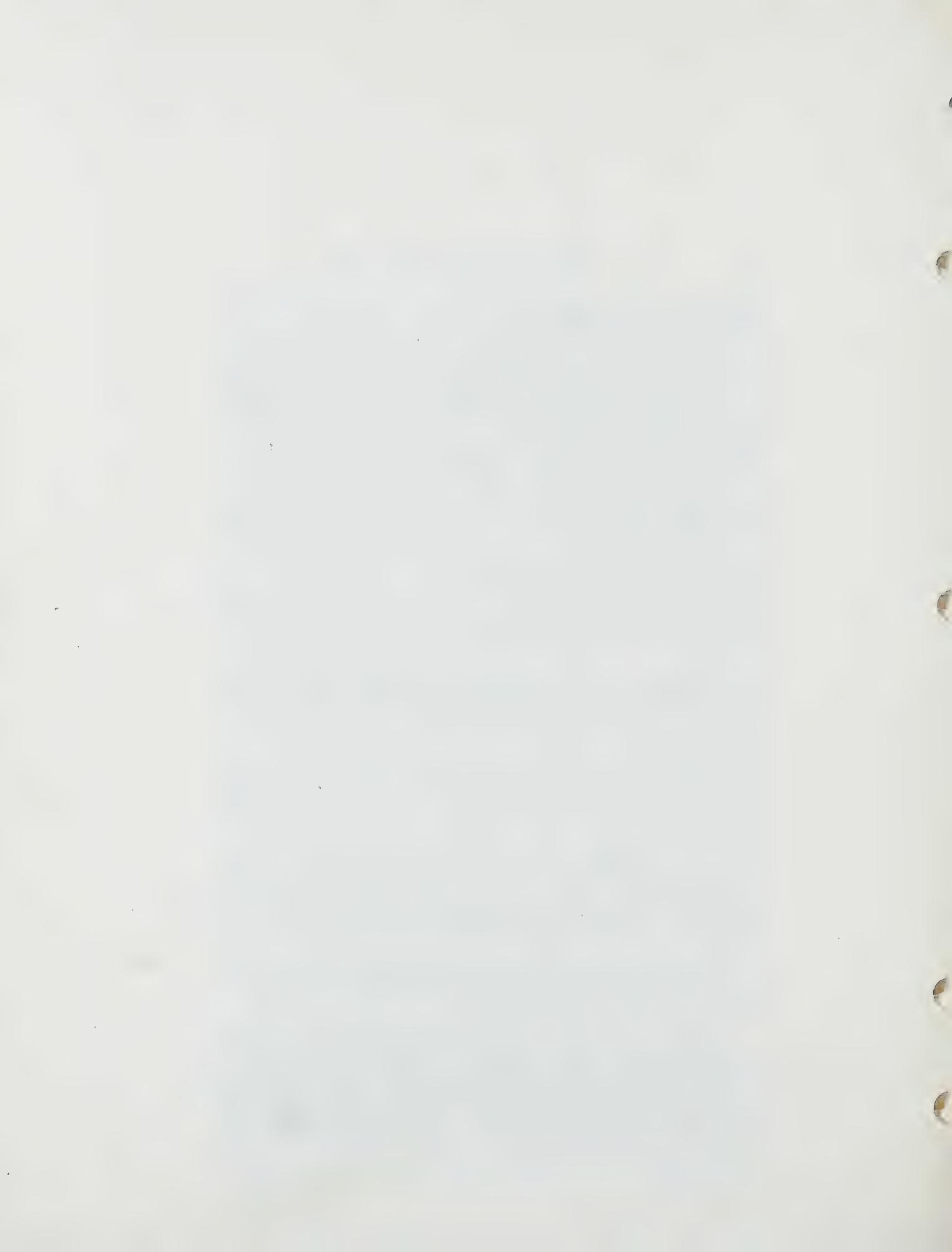
With respect to the second principle in the *Hodgson* case, i.e. that a b.f.o.q. must be shown to be "reasonably necessary to the normal operation of that particular business or enterprise", the Chairman suggested that the evidence had led him to the following conclusions (pp. 32-3):

- (1) Low seniority and the operation of a spare board system create stresses with which a person over the age of 40 is likely to have difficulty in coping.
- (2) There now exists no way of predicting a person's capacity to cope with those stresses.
- (3) The one reasonably reliable predictor of ability to cope with those stresses now available is age. In the absence of a more reliable test, the likelihood appears to be that a member of new drivers, over the age of 40, would be unable to cope with the stresses of low seniority and the spare board system, and therefore the risk of harm to the travelling public would increase.

On the basis of these considerations Chairman Abbott returned to the six questions he posed at the beginning and restated each one in positive terms (pp. 33-4). Therefore, he concluded (p. 34):

I am sufficiently satisfied that [the respondent] adopted its age limitation honestly, in good faith, in pursuance of its professed desire to protect public safety. That limit is supported in fact and reason, based on the practical reality of the work-day world of inter-city bus driving and of the life of the middle-aged person. It follows that the Respondent's practice of not hiring new inter-city bus drivers who are over the age of 40 has been a bona fide occupational requirement and not a proscribed discriminatory practice. Accordingly, the complaint of the commission in this case is dismissed.

** *Supra*, fn. 23.





1982 CASHRA ANNUAL CONFERENCE

(Extract)

Report of the Commission on Compulsory Retirement

February 1982

Manitoba

Marshall E. Rothstein, Q.C.
Commissioner

Panel: Section 15 of the Charter: Age Discrimination

Montebello, Quebec
May 31 - June 2, 1982

PART ONE

INTRODUCTION

Section 1 *Introduction*

SECTION 1
INTRODUCTION

The Commission on Compulsory Retirement was constituted by Order-in-Council Number 236, dated March 11th, 1981.

At the time that this Commission was established, a number of human rights adjudications and court decisions had ruled that the practice of compulsory retirement in this province was discriminatory pursuant to Section 6(1) of the Manitoba Human Rights Act Cap. H, 1975, S.M. 1974. Section 6(1) of the Manitoba Human Rights Act prohibits discrimination on the basis of age. However, one adjudication, in construing provincial statutes pertaining to pensions and government employees had found that the practice of compulsory retirement had not been explicitly abolished in the public sector. (This decision was subsequently overturned on appeal to the Court of Queen's Bench and on further appeal, the Court of Appeal upheld the Queen's Bench decision).

As well, the Manitoba Human Rights Commission had begun to receive an increasing number of complaints respecting compulsory retirement. These factors, together with the fact that the anti-age discrimination provision of the Manitoba Human Rights Act does not establish an upper age limit as does the majority of other similar provincial legislation, led the provincial government of the day to conclude that it was

INTRODUCTION-cont'd

"advisable and in the public interest to study and evaluate the matter of compulsory retirement". This Commission was established for that purpose.

A. Scope of The Inquiry

The Order-in-Council sets out the Commission's Terms of Reference, which were to consider:

- (a) The advisability or inadvisability of revising the Human Rights Act and/or related legislation;
- (b) Differences between the public and the private sector and within the public sector;
- (c) Trends and legislation in other jurisdictions;
- (d) Existing research and reports;
- (e) The relevance of pension plans and social security;
- (f) Such other matters as the Minister may, from time to time, refer to the Commissioner;
- (g) Such further matters as the Commissioner may consider to be incidental to the foregoing.

The Order-in-Council further instructed the Commission "to make findings and recommendations consistent with the public interest and general welfare of the people of Manitoba" and to consider "...public attitudes, industry concerns, employer concerns, administrative requirements and changing social values and priorities".

The terms of reference and a general consideration of the

INTRODUCTION-cont'd

issue of compulsory retirement raises numerous and complex related issues in areas of labour, social and economic policy. It was necessary for the Commission to decide to what extent it would consider and/or make recommendations on these related issues.

One such related issue which has received much media attention and which was frequently canvassed at the Public Hearings of this Commission, was that of pension schemes and particularly, the adequacy of pensions. Although pensions are relevant in a consideration of the issue of compulsory retirement, this Commission did not view the terms of reference as extending to a consideration of pension reform. A study of pension reform is itself a massive undertaking. Other jurisdictions have considered compulsory retirement and pension reform as distinct and deserving of separate analysis. For example, Ontario appointed the Royal Commission on Pension Reform and is presently studying the practice of compulsory retirement separately through hearings held under the auspices of the Department of Labour. Pensions therefore, are considered in the context of the issue of compulsory retirement, but pensions themselves are not the subject of the recommendations of this Commission.

Likewise, related economic issues of unemployment and inflation, while relevant in the consideration of compulsory retirement are not in themselves the subject of recommendations of this Commission.

INTRODUCTION-cont'd

B. Conduct Of Inquiry

During the course of its investigation, the Commission held the following Public Hearings:

1981

June 15	Brandon
June 16	Dauphin
June 17	The Pas
June 18	Thompson
June 23	Winnipeg
June 25	Gimli
July 20, 21, 22	Winnipeg

June hearing dates were set in order to avoid conflicting with pre-arranged summer holiday plans of those individuals who might have wished to present a brief at the hearings. July hearing dates for Winnipeg were set to provide additional time for those who required a longer period to prepare their submissions.

Public notices of the hearings were published in local newspapers as outlined below:

1981

Winnipeg Free Press	May 7, May 9, June 13, July 2, July 9
Brandon Sun	May 16, June 6, June 13
Dauphin Herald	May 18, June 3, June 10
Opasquia Times (The Pas)	May 18, June 5, June 12
Thompson Citizen	May 15, June 5, June 12
Interlake Spectator (Gimli)	May 18, June 13, June 17

INTRODUCTION-cont'd

Additionally, local radio stations in the respective areas, were requested to air public service announcements of the particulars of the Public Hearings.

In mid-May, 115 letters were sent to various union and business associations and organizations which might have an interest in the issue of compulsory retirement. The letter solicited the views of these groups and asked whether they wished to present a written and/or oral submission to the Public Hearings. In all, forty-three organizations or individuals presented their views at the Public Hearings of this Commission.

The Public Hearings were only one aspect of the Commission's inquiry. Substantial research was undertaken over a period of six months. Numerous studies, reports and publications dealing with all aspects of compulsory retirement, were compiled and reviewed.

Among organizations and government bodies contacted for information and resource data were the Departments of the Attorney General of each province and of the Federal Government, the Department of Labour of several provinces, the National Advisory Council on Aging, the Ministry of National Health and Welfare for Canada, Statistics Canada, Labour Canada, the United States Department of Labour and various other U.S. government agencies, the U.S. Special Senate Committee on Aging, the Canadian Human Rights Commission, the

INTRODUCTION-cont'd

Manitoba Human Rights Commission, the New Brunswick Human Rights Commission, the British Columbia Human Rights Commission, the Conference Board of Canada, the Economic Council of Canada, and the Embassies of the United Kingdom and France in Canada.

As well, certain libraries contained useful information and aided in the search for material. Among these were the University of Manitoba Faculty of Law Library and Dafoe Library, the Manitoba Human Rights Commission Library, the Manitoba Department of Health Library, and the Winnipeg Library of Employment and Immigration Canada.

Information and statistics received through briefs tendered at the Public Hearings aided the research task of this Commission and the views expressed at the Public Hearings were of substantial assistance in determining public attitudes and in enabling the Commission to better ascertain the concerns of individuals, organized labour, the private sector and other interested agencies and organizations in Manitoba. Thus, the Public Hearings were an important and valuable aspect of this Commission's proceedings.

INTRODUCTION-cont'd

C. Acknowledgements

The Commission wishes to acknowledge the assistance and patience of all those who tendered submissions and who responded to the further questions of the Commission after the Public Hearings.

It is impossible to specifically thank the great number of individuals who lent their time and expertise to this effort, yet a few should be cited; among these are John Corp of Reed Stenhouse Associates, for his assistance with respect to pensions, Jack London, Dean of the University of Manitoba, Faculty of Law and Professor Walter Tarnopolsky of the University of Ottawa, for commentary dealing with human rights and legal and social issues; Mike Batten of the U.S. Special Senate Committee on Aging for his expertise in relating and explaining the U.S. experience, and to Alan Simms who, as Executive Assistant to the Commission, handled administrative matters and contributed significantly to the research and drafting of this Report.

PART TWO

CONCLUSIONS AND RECOMMENDATIONS

Section 2 Summary of Conclusions

Section 3 Récommendations

SECTION 2
SUMMARY OF CONCLUSIONS

This section reproduces the conclusions reached in Parts
Three, Four, Five and Six of this Report.

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(◀)

SUMMARY OF CONCLUSIONS-cont'd

PART THREE

TRENDS AND PUBLIC ATTITUDES

Section 4

Background To Retirement

The concept of retirement evolved with pension plans and security programs for older workers. At first retirement schemes were, for the most part, voluntary. Mandatory retirement did not take hold until after the Depression of the 1930s. By the 1940s and 1950s, retirement at a fixed age was socially acceptable as a reward for an employee's long service.

Age 65 for retirement was instituted in most public pension and benefit schemes and appears to have been adopted as a normal retirement age for most occupations.

SUMMARY OF CONCLUSIONS-cont'd

Section 5

Legal Analysis

With the advent of pensions and social security, a normal retirement age became recognized, usually at age 65.

In the late 1960s, the United States recognized the need to provide legislation to prohibit age discrimination against older workers. The thrust of this legislation was not to prevent compulsory retirement but to promote job opportunities for workers over the age of 40. Canadian human rights legislation recognizing age discrimination was not enacted until the early 1970s. The thrust of this legislation also was to promote job opportunities for older workers, and not to prohibit compulsory retirement.

Only within the last few years has human rights legislation in Canada and the United States been recognized as a possible vehicle for challenging the concept of compulsory retirement. The Age Discrimination in Employment Act in the United States prohibits compulsory retirement for federal civil servants at any age and for other employees up to the age of 70. Thirteen states prohibit compulsory retirement at any age. In Canada, only Manitoba and New Brunswick currently prohibit compulsory retirement at any age, although seven of the eight other provinces prohibit compulsory retirement below the age of 65. The Province of Quebec is likely to reintroduce specific legislation abolishing compulsory retirement in 1982 and surveys and reports from a number of other provinces suggest that there is a move to abolish compulsory retirement at any age in those provinces.

SUMMARY OF CONCLUSIONS-cont'd

Section 6

Recent Major Studies

The conclusions of the five recent significant reports reviewed suggested that the impact of abolishing compulsory retirement would be minimal. Recommendations, where made, tended to favour abolition of compulsory retirement.

SUMMARY OF CONCLUSIONS-cont'd

Section 7

Public Attitudes To Compulsory Retirement

1. In the United States the public is strongly against compulsory retirement, at least in principle. When practical considerations are taken into account, this strong opposition is somewhat tempered, but a significant majority still opposes compulsory retirement.
2. In Canada, the trend has been towards increasing opposition to compulsory retirement although provincial civil servants in Manitoba tend to favour compulsory retirement. The most recent surveys indicate that a small majority opposes compulsory retirement. More younger people oppose compulsory retirement than do older people.
3. Larger employers tend to favour compulsory retirement. Organized labour tends to be divided on the issue.

SUMMARY OF CONCLUSIONS-cont'd

Section 8

Review Of Submissions And Briefs
Tendered At The Public Hearings

1. Overall, no overwhelming support emerged for or against compulsory retirement. Of the 43 submissions received, 21 opposed compulsory retirement; 18 were in favour of compulsory retirement; and 4 had not come to a policy decision or recommendation.
2. Of those in the 'Employer or Employer Organizations' grouping, there was strong support for compulsory retirement.
3. Human rights groups were strongly in favour of abolishing compulsory retirement.
4. Six 'Labour Organizations' opposed compulsory retirement and three favoured it. One did not adopt a position. It should be noted that of those 'Labour Organizations' in favour of compulsory retirement, one was the Manitoba Federation of Labour (MFL). The MFL represents a significant percentage of organized labour in this province as the Manitoba branch of the Canadian Labour Congress. The Commission ascertained that the position of the MFL was arrived at by a vote of delegates at a recent convention, but there is no indication of the size of the majority of delegates that supported compulsory retirement.
5. Of individuals making submissions, there was no clear support for or against compulsory retirement.

SUMMARY OF CONCLUSIONS-cont'd

PART FOUR

HUMAN RIGHTS AND FREEDOMS

Section 9

Human Rights And Freedoms

The right to equality of opportunity is the relevant human right for consideration. This right to equality of opportunity should be extended to older workers, who represent at least a quasi-minority group.

As compulsory retirement violates the right to equality of opportunity, it should not be condoned. However, no right can be absolute and exceptions may be necessary.

The practical ramifications of abolishing compulsory retirement are considered in PART FIVE and possible exceptions to abolition of compulsory retirement are considered in PART SIX.

SUMMARY OF CONCLUSIONS-cont'd

PART FIVE

PRACTICAL RAMIFICATIONS OF ABOLISHING
COMPULSORY RETIREMENT

Section 10

Number Affected By Compulsory Retirement

1. There is a correlation between the existence of pension plans and compulsory retirement.
2. The incidence of mandatory retirement is much greater in larger organizations than in small organizations.
3. There is a greater incidence of mandatory retirement affecting office and professional workers than non-office and blue-collar workers although the latter are still significantly affected. Workers in heavy industry do not appear to be significantly affected by the policy.
4. Mandatory retirement is far more prevalent in the public sector than in the private sector.
5. The Conference Board Statistics indicate that only 25-30% of those age 55-65 will work to age 65 (the preponderant age for mandatory retirement) and of these, only the equivalent of a small percentage of the total work force might want to continue working. U.S. studies suggest a similar result.
6. The incidence of compulsory retirement provisions in collective agreements in Manitoba would not appear to be significant.
7. Using Conference Board analysis and assumptions, the number of individuals in Manitoba who retire at 65 each year subject to compulsory retirement is not large, as a

SUMMARY OF CONCLUSIONS-cont'd

percentage of the total Manitoba labour force. The number of those who might actually want to continue working would constitute an even smaller percentage of the total labour force.

8. The Health and Welfare Canada Survey (1977) indicated that:

- a) Of those active males surveyed who indicated a preference, 70% preferred a retirement age prior to age 65.
- b) By contrast, only about 40% of retired males would have preferred retirement prior to age 65.
- c) The pattern was similar for females.
- d) The attitudes for active men who indicated a preference were similar amongst the various employment sectors (private, public, self employed). However, there was substantially more uncertainty amongst those in the self employed sector. Possibly this reflects a lower incidence of pension coverage and a resultant feeling of financial insecurity for the self employed as compared to the public sector.
- e) The occupational category (managerial/professional/technical, other white collar, other blue collar and primary blue collar) has somewhat of a bearing on preferred retirement ages. The percentage preferring retirement after age 65 for active males is greatest in managerial/professional/technical positions. However, the preference for retirement after age 65 for active males in all classifications is much less than the

SUMMARY OF CONCLUSIONS-cont'd

preference for retirement after 65 by retired males.

9. Adequacy of retirement income and health are major influences on the retirement decision.

10. As the retirement decision is based on attitudes which are tied to certain environmental factors (e.g. inflation), it is difficult to accurately predict how many individuals currently subject to compulsory retirement, would continue to work if compulsory retirement were effectively abolished.

SUMMARY OF CONCLUSIONS-cont'd

Section 11

Public Sector Overview

1. Provisions for compulsory retirement appear widespread in the public sector.
2. The predominant age for compulsory retirement in the federal civil service is 65. Retirement ages in the RCMP and Canadian Armed Forces depend upon rank and length of service. The maximum age is 55 in the Canadian Armed Forces, and 62 in the RCMP. The retirement age for federally appointed judges is 75.
3. All provinces including Manitoba and New Brunswick (neither Manitoba nor New Brunswick has a maximum age limit in its human rights legislation), have by legislation or policy established age 65 as the mandatory retirement age for provincial civil servants.
4. Retirement policies in municipalities vary widely. However, recent adjudication and court decisions have caused municipalities to commence following practices of non-compulsory retirement.
5. The Public Schools Act provides that a policy of mandatory retirement for school teachers in Manitoba may apply at or over age 65.
6. Police officers in Winnipeg are required to retire at age 60. Similar mandatory retirement provisions apply to police officers in other municipalities.
7. The Commission has not been able to determine any valid reason why the public and private sectors might be treated differently with respect to mandatory retirement.

SUMMARY OF CONCLUSIONS-cont'd

Section 12

The Impact Of Job Opportunities On
Younger Workers

Over the longer term many factors, such as governmental employment and fiscal policies and the state of the provincial economy, might have an effect on youth unemployment. Isolating the impact of abolishing compulsory retirement is difficult.

However, a review of labour force growth and the Canadian and American studies and reports, support a tentative conclusion that the youth component of the labour force would not be significantly affected in terms of job opportunities or advancement by the abolition of the practice of mandatory retirement. This is as a result of at least three factors:

- 1) the estimated limited number of older individuals opting to continue working past what was previously considered a normal retirement age; in other words, a limited increase in the labour force participation of older individuals;
- 2) the estimated limited number of years that older workers would remain in the labour force;
- 3) a limited number of occupational groupings in which a position vacated by a retiring older worker could be filled by a younger worker.

SUMMARY OF CONCLUSIONS-cont'd

Section 13

Consideration Of Employee Performance
Appraisal Systems

1. There is evidence to suggest that some performance appraisals may be inadequate or poorly administered. To the extent that such problems exist, they should be addressed by employers. Compulsory retirement does not solve this problem and is not justified by it.
2. Evidence indicates that older workers are generally not inefficient. To the extent that they may 'coast' to retirement, substitution of performance appraisals for mandatory retirement might discourage 'coasting' and may well result in there being fewer dismissals of older workers.
3. It is in the best interest of employers to deal with terminations of employees in a humane and reasonable way. Moreover, where firms have not had mandatory retirement policies, the evidence suggests that employees often realize when they should leave. Thus, any tendency towards embarrassing early dismissals should be minimized.
4. Performance appraisal systems already largely exist for managerial positions and in addition, often exist where a policy of mandatory retirement exists. Thus little or no cost in these cases would be associated with the abolition of compulsory retirement.
5. The introduction of effective performance appraisals where none now exist should have a beneficial effect on

SUMMARY OF CONCLUSIONS-cont'd

the efficiency of a firm. The cost of the performance appraisal system must be offset by this benefit. It is likely in a firm's best interest that reliable performance appraisals be developed and properly administered.

6. Some occupations may defy application of performance appraisals. In other cases, performance appraisal may be practically not possible. In such cases and where age is not an unreasonable proxy, compulsory retirement on the basis of age may be necessary. These situations will have to be considered on a case by case basis.

Consideration of the impact of abolishing compulsory retirement on performance appraisals has been one of the more difficult issues to analyse. However, in the Commission's view, the concerns expressed, with limited exceptions, do not warrant the retention of compulsory retirement.

SUMMARY OF CONCLUSIONS-cont'd

Section 14

Retirement Income, Pensions And Employee
Benefits, Social Security

1. Abolition of compulsory retirement would probably have little effect in enabling those individuals closest to the poverty level to improve their financial condition.
2. Where inadequate retirement income results from the rules of pension plans that render an individual's pension inadequate, the more direct way of addressing that problem is through pension reform.
3. Those members of the public whose post-retirement income is a relatively large portion of their pre-retirement income, would have little financial incentive to continue working.
4. Those members of the public whose job-related pension is indexed would have little financial incentive to continue working.
5. Persistent high inflation will erode the financial adequacy of non-indexed or inadequately indexed pensions. Employees covered by such pensions may find it desirable and perhaps necessary to continue working past age 65.
6. Based on available information, this Commission sees no reason why abolishing compulsory retirement need diminish labour's success in bargaining for earlier retirement ages. Nor does the Commission find persuasive the argument that abolition of compulsory retirement would result in a downgrading of the quality of pensions.

SUMMARY OF CONCLUSIONS-cont'd

7. It is clear that no experts hold the view that abolition of compulsory retirement would increase government transfer payments to older persons. At worst, there would be no impact, at best there might be a modest reduction.

The Commission has determined that abolition of compulsory retirement would likely not have a material effect on youth unemployment, and therefore not significantly increase unemployment insurance or welfare costs (Section 12).

The Commission concludes that overall, the impact of abolishing compulsory retirement on government transfer payments should not be material.

8. Depending on the nature and rules of the pension plans, the cost impact of abolishing compulsory retirement on pensions will vary. Generally, the abolition of compulsory retirement would not appear to have a significant cost impact on pension plans. However, in the case of final average plans, where salary increases rapidly, as well as in the case where benefits continue to accrue, there may be a cost to a plan.

In those cases where abolition of compulsory retirement is shown to create significant cost burdens on pension plans, the solution could be to explicitly include pensions

SUMMARY OF CONCLUSIONS-cont'd

within Section 7(2) of the Manitoba Human Rights Act. (Pensions are probably implicitly included in the term "employee benefit plan" but this could be clarified).

Section 7(2) states:

"No provision of section 6 or subsection (1) shall prohibit a distinction on the basis of age, sex, family status, physical handicap or marital status

- (a) of any employee benefit plan or in any contract which provides an employee benefit plan, if the Commission is satisfied on the basis of the guidelines set out in the regulations that the distinction is not discriminatory or that the employee benefit can be provided only if the distinction is permitted; or
- (b) in any contract which provides life insurance, accident and sickness insurance or a life annuity to a specified person where the contract is not part of an employee benefit plan if the Commission is satisfied on the basis of the guidelines set out in the regulations that the distinction is not discriminatory or that the insurance or annuity can be provided only if the distinction is permitted."

By adding the word "practicably" immediately prior to the word "provided" in subsections '(a)' and '(b)', this section could be a means for adopting special provisions in pension plans for employees over the age of 65 and for exempting certain plans from the general anti-age discrimination provisions, where costs associated with providing actuarially adjusted benefits or of continuing employer contributions to employees over a given age are prohibitive.

Appropriate guidelines should be developed as regulations by the Human Rights Commission. In the interim, for a

SUMMARY OF CONCLUSIONS-cont'd

period of say two years, there should be no requirement to change existing plans in order for employers to review the full cost impact.

9. Cutting off employee benefits at age 65 for those workers continuing to be employed is *prima facie* discriminatory. Some employers currently continue certain benefits for retired employees. If a problem is to arise, it will be with respect to those specific benefit plans for which the cost becomes onerous for employers or in which the overall benefits to other members of the plan are reduced.

A review of the various group benefit plans suggests that overall, continuation of benefits to employees who continue working as a result of the abolition of compulsory retirement would tend to increase the costs of such plans. However, these increases might not be significant for at least three reasons:

- 1) The limited number of workers expected to work past age 65, at least in the near future;
- 2) The relatively short duration of the working period after age 65;
- 3) The experience of U.S. employers to the effect that primarily the more healthy employees stay on.

This Commission is of the opinion that employers and other members should not be burdened unduly as a result of the continuation of employees past age 65, and an exemption or

SUMMARY OF CONCLUSIONS-cont'd

limitation of the application of specific plans to those over age 65, might in such circumstances be justified.

It has been difficult to ascertain whether costs will increase significantly and which type of benefit plans will be most affected. It seems reasonable to allow a period of time (say two years) for employers, unions and experts such as actuaries, to assess the cost impact. For this limited period of time, therefore, there should be no requirement to change existing plans. After this period, benefits under plans should be applicable to employees of any age unless excessive cost justifies exception or limitation of the application of specific plans to employees over a given age.

It is the Commission's view that Section 7(2) of the Manitoba Human Rights Act could be the vehicle for exclusion of benefits to employees over a specified age for reasons of undue cost. The suggested amendments to Section 7(2) in respect of pension plans (i.e. adding the word "practicably") could accomplish that objective. The Human Rights Commission could develop guidelines for the adoption of regulations following the assessment period.

SUMMARY OF CONCLUSIONS-cont'd

Section 15

Pre-Retirement Counselling

1. Pre-retirement counselling, especially by the group method, appears to be an effective means of reducing uncertainty and apprehension associated with being retired.
2. Pre-retirement counselling is more effective when commenced at least 10 years prior to retirement, and preferably 15 years prior to retirement so as to provide individuals with time to implement plans.

SUMMARY OF CONCLUSIONS-cont'd

PART SIX

EXCEPTIONS TO EQUALITY OF OPPORTUNITY

Section 16

Exceptions To The Right Of Equality Of Opportunity In The Context Of Compulsory Retirement

1. The Commission is not satisfied that a provision for compulsory retirement should be left to the collective bargaining process. Leaving the matter to the will of the majority with resulting denial of minority rights cannot be justified.
2. The 'reasonable occupational qualification and requirement' exception in Section 6(6) of the Human Rights Act has merit.

In the context of anti-discrimination legislation, the Commission is of the opinion that honest motive and objective facts and reasons should both be elements of proving entitlement to the exception. Interpretation of the term 'reasonable occupational qualification and requirement' will be left to the Courts, but should it be found that the term does not require both elements, then amendments to the exception could be made so as to ensure that both elements are necessary.

3. It may be that there are public interest requirements in respect of specific occupations that override the requirement not to discriminate on the basis of age.

SUMMARY OF CONCLUSIONS-cont'd

Until Section 6(6) is further interpreted by the courts, it is not possible to determine whether the reasonable occupational qualification exemption is sufficient. Should it be determined that the Section 6(6) exception is too restrictive, the Human Rights Act could be amended to provide for an application to the Human Rights Commission by employers, employees and trade unions or other interested groups for specific exemption from the general anti-age discrimination provision of the Act. Controversial cases would be referred to Boards of Adjudication, as is done at present. The exemption should be construed strictly and would be of use where there was a public interest requirement that overrode the requirement not to discriminate on the basis of age.

4. The Commission is of the view that independence of the judiciary necessitates the retention of mandatory retirement for provincial judges.
5. Abolition of compulsory retirement would not preclude the dismissal of employees for just cause.
6. Although legislation in the United States provides for an exception to the general prohibition against age discrimination for reasonable factors other than age, the Commission is not of the view that this is a necessary amendment to the Manitoba Human Rights Act at this time.

SUMMARY OF CONCLUSIONS-cont'd

7. The Commission attempted to ascertain specifically what difficulties would arise if no phase-in or transitional period were provided in respect of abolishing compulsory retirement but could not identify significant difficulties.
8. It is unlikely that there will be a significant adverse affect on manpower planning as a result of the abolition of compulsory retirement. Reasonable notice given in good faith by employees of their intended retirement dates would go a long way to alleviating whatever problems might arise.

SECTION 3
RECOMMENDATIONS

1. The practise of compulsory retirement should be abolished in this province in the private and public sector. Recent judicial interpretation indicates that Section 6(1) of the Manitoba Human Rights Act accomplishes this purpose.
2. The provisions of provincial statutes that provide for compulsory retirement, should be repealed. This would include amendment of the following legislation:

The Public Schools Act
The Provincial Auditors Act
The Civil Service Superannuation Act
The Civil Service Act and Regulations thereto
3. Permitting age to be an exception where it is a reasonable occupational qualification and requirement (Section 6(6) of the Manitoba Human Rights Act) should be retained unaltered, provided that judicial interpretation confirms the requirement that both proper motive and objective reasons and facts are necessary elements of proving entitlement to the exception.
4. It may be that after a period of time it will become apparent that some occupations do not lend themselves to

RECOMMENDATIONS-cont'd

voluntary retirement practices. If it is determined that the reasonable occupational qualification exception of the Manitoba Human Rights Act does not accommodate such situations, the Human Rights Act should be amended to include a provision permitting employers, employees and other interested parties to make application to the Human Rights Commission for an exception for certain occupations from the general anti-age discrimination provisions.

Such applications would be considered by the Human Rights Commission on a case by case basis. The Human Rights Commission would have regard to all considerations that it deemed relevant and on this basis, would determine whether an exemption was appropriate and for what period of time. Controversial cases would be referred to boards of adjudication, as at present. Because an exemption would be at issue, the exemption should be construed strictly and the burden of proof for those seeking the exemption should be substantial. It should be emphasized that the situations envisioned by the Commission would be those where there was a public interest requirement that overrode the requirement not to discriminate on the basis of age.

5. Provincial Judges constitute a special occupation. Independence is paramount. Dismissal of judges is rare and only accomplished through formal and extensive

RECOMMENDATIONS-cont'd

procedures. Mandatory retirement specified in the Provincial Judges Act should be stated to apply notwithstanding the provisions of the Human Rights Act.

6. Required changes to pension plans and employee benefit plans for the purpose of making their application uniform to all employees should be assessed over a period of time (say two years). No changes to such plans should be required during this period of assessment. After the assessment is completed, the Human Rights Commission should formulate guidelines to be incorporated as regulations to the Human Rights Act. Exceptions should be permitted where the cost burden would be undue on employers or other members of the plan. Section 7(2) of the Human Rights Act should be amended to explicitly refer to "pension plans" and the exemption should, by amendment, be available where plans cannot be "practicably" provided.
7. A number of recent cases involving mandatory retirement could have been avoided had the Human Rights Act explicitly stated that it took precedence over other legislation. The human rights legislation of a number of other provinces have such an overriding provision. Terminology such as the following should be incorporated in the Manitoba Human Rights Act:
"Unless it is expressly declared by an Act of the legislature that it operates notwithstanding this Act, every law of

RECOMMENDATIONS-cont'd

Manitoba is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act."

8. The provincial government should assemble and assess data with respect to the impact of abolishing compulsory retirement and in particular with respect to the numbers of individuals choosing to remain employed after a normal retirement age and for what period they remain employed.
9. Within five years (or such earlier time as information becomes available), the impact of abolishing compulsory retirement should be reassessed to determine what, if any, adverse consequences (e.g. on manpower planning) there have been to the public interest, to employees or to employers.
10. Studies have shown that individuals would be more satisfied in retirement had they been exposed to some form of pre-retirement counselling. The Government should encourage and fund group pre-planning of retirement through appropriate government and social agencies.
11. Complaints of discrimination should be dealt with by the Human Rights Commission expeditiously. Delay itself is prejudicial to both the complainant and to the accused. While the gathering of facts and the analysis of complex legal issues can be time consuming, the processing of complaints should be closely monitored to ensure that

RECOMMENDATIONS-cont'd

they receive prompt and efficient handling by the Human Rights Commission and Boards of Adjudication appointed to consider controversial complaints.

12. The Terms of Reference of this Commission did not include pension or social security reform. Nonetheless, the investigation of the matter of compulsory retirement has indicated that there is a need for pension and social security reform. The Government of Manitoba should embark upon a comprehensive study of pension and social security reform at an early date.



CONFERENCE ANNUELLE 1982 DE L'ACOSPDH

Assemblée nationale du Québec

Projet de loi n° 15

Loi sur l'abolition de la retraite obligatoire
et modifiant certaines dispositions législatives

Débat: Article 15 de la Charte: Discrimination fondée
sur l'âge

Montebello (Québec)
du 31 mai au 2 juin 1982

ASSEMBLÉE NATIONALE DU QUÉBEC

TRENTE-DEUXIÈME LÉGISLATURE

TROISIÈME SESSION

Projet de loi n° 15

**Loi sur l'abolition de la retraite obligatoire
et modifiant certaines dispositions législatives**

Première lecture le 9 décembre 1981

Deuxième lecture le 4 mars 1982

Troisième lecture le 25 mars 1982

Sanctionné le 1^{er} avril 1982

L'ÉDITEUR OFFICIEL DU QUÉBEC

1982

NOTES EXPLICATIVES

Ce projet de loi a pour objet l'abolition de la retraite obligatoire.

Tout en préservant le droit du salarié de prendre volontairement sa retraite à l'âge normal de la retraite, ce projet de loi lui donne le droit de demeurer au travail malgré le fait qu'il ait atteint cet âge. La Loi sur les normes du travail est donc modifiée en conséquence.

Ce nouveau droit du salarié s'applique aussi bien à celui qui participe à un régime de retraite, privé ou public, qu'à celui qui ne participe à aucun régime de retraite.

Ce projet de loi prévoit en outre un recours devant un commissaire du travail pour le salarié qui croit avoir été congédié, suspendu ou mis à la retraite parce qu'il a atteint l'âge de la retraite. Ce recours s'exercera selon les règles du Code du travail mais le délai pour l'exercer sera alors de 90 jours.

Ce projet de loi permet également au salarié de choisir le moment de la perception de sa rente de retraite. Il pourra la percevoir, s'il cesse de travailler, dès qu'il est admissible à la retraite. S'il choisit de demeurer au travail, le paiement de la rente sera ajourné et cette rente sera revalorisée au moment de la prise de la retraite.

Si un salarié choisit de demeurer au travail après l'âge normal de la retraite et qu'il subit une diminution de son traitement, il pourra percevoir une partie ou la totalité de sa rente afin de compenser cette diminution.

La loi s'appliquera à compter de sa sanction à tous les salariés. Toutefois pour les salariés qui participent à un régime de retraite, la loi s'appliquera à l'échéance de leur convention de travail.

Le gouvernement pourra, par règlement, exempter certains salariés ou certains employeurs de l'application de la loi.

Le ministre du Travail, de la Main-d'œuvre et de la Sécurité du revenu devra évaluer les effets de la loi et déposer les résultats de ses travaux à l'Assemblée nationale.

Projet de loi n° 15

Loi sur l'abolition de la retraite obligatoire et modifiant certaines dispositions législatives

SA MAJESTÉ, de l'avis et du consentement de l'Assemblée nationale du Québec, décrète ce qui suit:

1. L'article 3 de la Loi sur les normes du travail (1979, chapitre 45), modifié par l'article 1 du chapitre 5 des lois de 1980, est de nouveau modifié par l'insertion, après l'article 3, du suivant:

«**3.1** Malgré les articles 2 et 3, la section VI.1 et les articles 122.1 et 123.1 s'appliquent au gouvernement, à ses ministères et à ses organismes et à tout salarié ou employeur.».

2. Cette loi est modifiée par l'insertion, après l'article 84, de ce qui suit:

«SECTION VI.1

«LA RETRAITE

«**84.1** Un salarié a le droit de demeurer au travail malgré le fait qu'il ait atteint ou dépassé l'âge ou le nombre d'années de service à compter duquel il serait mis à la retraite suivant une disposition législative générale ou spéciale qui lui est applicable, suivant le régime de retraite auquel il participe, suivant la convention, la sentence arbitrale qui en tient lieu ou le décret qui le régit, ou suivant la pratique en usage chez son employeur.

Toutefois, et sous réserve de l'article 122.1, ce droit n'a pas pour effet d'empêcher un employeur ou son agent de congédier, suspendre ou déplacer ce salarié pour une cause juste et suffisante.».

3. Cette loi est modifiée par l'insertion, après l'article 90, du suivant:

90.1 Le gouvernement peut, par règlement, soustraire de l'application de la section VI.1 et de l'article 122.1 certaines catégories de salariés ou d'employeurs.

Un règlement adopté en vertu du premier alinéa peut l'être pour avoir effet à une date d'au plus six mois antérieure à celle de son adoption.».

4. L'article 102 de cette loi est modifié par le remplacement du premier alinéa par le suivant:

«**102.** Sous réserve des articles 123 et 123.1, un salarié qui croit avoir été victime d'une atteinte à un droit conféré par la présente loi ou un règlement peut adresser, par écrit, une plainte à la Commission.».

5. L'article 122 de cette loi, modifié par l'article 10 du chapitre 5 des lois de 1980, est de nouveau modifié par le remplacement du paragraphe 1° du premier alinéa par le suivant:

«1° à cause de l'exercice par ce salarié d'un droit, autre que celui visé à l'article 84.1, qui lui résulte de la présente loi ou d'un règlement;».

6. Cette loi est modifiée par l'insertion, après l'article 122, du suivant:

«**122.1** Il est interdit à un employeur ou à son agent de congédié, suspendre ou mettre à la retraite un salarié pour le motif qu'il a atteint ou dépassé l'âge ou le nombre d'années de service à compter duquel il serait mis à la retraite suivant une disposition législative générale ou spéciale qui lui est applicable, suivant le régime de retraite auquel il participe, suivant la convention, la sentence arbitrale qui en tient lieu ou le décret qui le régit, ou suivant la pratique en usage chez son employeur.».

7. Cette loi est modifiée par l'insertion, après l'article 123, du suivant:

«**123.1** L'article 123 s'applique à un salarié qui croit avoir été congédié, suspendu ou mis à la retraite pour le motif énoncé à l'article 122.1.

Cependant, le délai pour soumettre une plainte au commissaire général du travail est alors porté à 90 jours.».

8. La Loi sur les régimes supplémentaires de rentes (L.R.Q., chapitre R-17) est modifiée par l'insertion, après l'article 44, de ce qui suit:

SECTION V.1

«AJOURNEMENT DE LA RETRAITE

«44.1 Sous réserve de l'article 44.2, le paiement de la rente de retraite d'un salarié est ajourné lorsque, après l'âge normal de la retraite, il demeure au travail auprès de l'employeur au service duquel il était à cet âge.

L'ajournement du paiement de la rente a lieu tant qu'un régime supplémentaire est en mesure de demeurer conforme à la présente section tout en demeurant un régime enregistré de retraite au sens de l'article 1 de la Loi sur les impôts (L.R.Q., chapitre I-3).

Cependant, cet ajournement prend fin dès que le salarié cesse tout travail auprès de son employeur.

«44.2 Pendant la période d'ajournement, un salarié peut exiger le paiement de sa rente, en tout ou en partie, mais seulement dans la mesure nécessaire pour compenser une réduction de salaire survenue au cours de cette période.

Un salarié ne peut faire cette demande plus d'une fois par période de douze mois à moins d'entente avec l'administrateur du régime supplémentaire.

Toutefois, après entente avec son employeur et si le régime supplémentaire le prévoit, un salarié peut recevoir la totalité ou une partie de la rente sans égard à la limite prévue par le premier alinéa.

«44.3 S'il y a ajournement du paiement de la rente, en tout ou en partie, tout montant de la rente non versé durant la période d'ajournement doit être revalorisé quand tout ajournement a pris fin.

Un régime supplémentaire doit prévoir comment effectuer cette revalorisation.

«44.4 La revalorisation visée à l'article 44.3 doit être telle que le montant de la rente qui devient payable à la fin de la période d'ajournement soit le montant d'une rente actuariellement équivalente:

a) à la rente dont le paiement aurait débuté à l'âge normal de la retraite n'eût été de l'ajournement de son paiement; ou

b) dans le cas d'une rente dont le paiement a été ajourné avant la date de prise d'effet du présent article, à la rente qui aurait été payable à cette date si son paiement avait débuté à ce moment.

Cette revalorisation ne doit pas créer que des surplus dans la caisse du régime supplémentaire. Elle ne doit pas non plus y créer que des déficits.

“44.5 Si des contributions sont versées durant la période d’ajournement, la rente additionnelle qui en résulte doit être au moins égale en valeur à la rente que constitueraient, à la fin de la période d’ajournement, les contributions versées par le salarié au cours de cette période.

“44.6 Si un salarié dont le paiement de la rente a été ajourné en tout ou en partie décède durant la période d’ajournement, le paiement du montant non versé de cette rente est réputé avoir débuté le jour précédent le décès.”.

9. L’article 75 de cette loi est modifié par l’addition, après le paragraphe *u*, des suivants:

“*v*) ce qui est permis, obligatoire ou prohibé pour effectuer la revalorisation visée dans la section V.1;

“*w*) ce qui constitue le salaire, la manière de l’établir et les périodes pour lesquelles il est calculé, aux fins de l’article 44.2.”.

10. Les modifications nécessaires pour rendre conforme à la présente loi un régime de retraite existant ou en vigueur le 1^{er} avril 1982 et auquel s’applique la Loi sur les régimes supplémentaires de rentes, doivent être présentées à la Régie des rentes du Québec avant le 1^{er} octobre 1982.

11. Malgré l’article 10, si un régime de retraite visé dans cet article concerne des salariés qui sont régis, selon le cas, par une convention collective au sens du Code du travail (L.R.Q., chapitre C-27) ou au sens de la Loi sur les relations du travail dans l’industrie de la construction (L.R.Q., chapitre R-20), par une sentence arbitrale qui en tient lieu ou par un décret au sens de la Loi sur les décrets de convention collective (L.R.Q., chapitre D-2) ou au sens de la Loi sur les relations du travail dans l’industrie de la construction qui est en vigueur le 1^{er} avril 1982, les modifications nécessaires pour rendre un tel régime conforme à la présente loi doivent être présentées à la Régie des rentes du Québec au plus tard trois mois après la date, selon le cas, de la signature d’une nouvelle convention collective, du prononcé d’une sentence arbitrale qui en tient lieu, de la prolongation ou du renouvellement de ce décret ou de l’entrée en vigueur d’un décret qui remplace ce décret expiré.

12. Dès qu’elles ont été approuvées conformément à la Loi sur les régimes supplémentaires de rentes, les modifications visées aux articles 10 et 11 sont réputées avoir effet:

1° dans le cas de l’article 10, depuis le 1^{er} avril 1982;

2° dans le cas de l’article 11:

a) à l'égard des salariés régis, selon le cas, par une convention collective, par une sentence arbitrale ou par un décret en vigueur le 1^{er} avril 1982, depuis la date d'expiration de cette convention collective ou de cette sentence arbitrale ou depuis la date d'expiration, de prolongation ou de renouvellement de ce décret;

b) à l'égard des autres salariés, depuis le 1^{er} avril 1982.

13. Les dispositions relatives à la retraite obligatoire d'une personne en raison de l'âge ou du nombre d'années de service qui sont contenues dans la Loi sur le régime de retraite des employés du gouvernement et des organismes publics (L.R.Q., chapitre R-10) et dans les régimes constitués en vertu de cette loi, dans la Loi sur le régime de retraite des enseignants (L.R.Q., chapitre R-11), dans la Loi sur le régime de retraite des fonctionnaires (L.R.Q., chapitre R-12) et dans la Loi concernant la protection à la retraite de certains enseignants (1978, chapitre 16) cessent d'avoir effet:

1° à l'égard des participants à ces régimes qui sont régis par une convention collective au sens du Code du travail ou par une sentence arbitrale qui en tient lieu, en vigueur le 1^{er} avril 1982, à compter du 1^{er} janvier 1983 ou de leur date d'expiration si celle-ci est postérieure au 1^{er} janvier 1983;

2° à l'égard des participants à ces régimes qui sont régis par un décret au sens de la Loi sur les décrets de convention collective, en vigueur le 1^{er} avril 1982, à compter du 1^{er} janvier 1983 ou de sa date d'expiration, de prolongation ou de renouvellement si celle-ci est postérieure au 1^{er} janvier 1983;

3° à l'égard des participants à ces régimes qui sont régis par un règlement du gouvernement ou du Conseil du trésor qui est en vigueur le 1^{er} avril 1982 et qui fixe leurs conditions de travail, à compter du 1^{er} janvier 1983;

4° à l'égard des participants à ces régimes qui ne sont pas visés aux paragraphes 1°, 2° et 3°, à compter du 1^{er} janvier 1983.

14. Sous réserve de la Loi sur les impôts et de l'article 15, un participant visé à l'article 13 continue de cotiser au régime de retraite qui lui est applicable s'il exerce une fonction, visée par ce régime, après avoir atteint ou dépassé l'âge ou le nombre d'années de service à compter duquel, selon son régime de retraite, il aurait été mis à la retraite.

De même, l'employeur de cette personne continue de contribuer au régime.

15. Les régimes de retraite visés à l'article 13 devront, à compter de la date où les dispositions relatives à la retraite obligatoire qui sont contenues dans ces régimes cessent d'avoir effet aux

termes de l'article 13, permettre à une personne qui demeure au travail après l'âge normal de la retraite de recevoir à la fois un traitement et des prestations en vertu de son régime de retraite lesquels ne pourront cependant excéder le traitement de cette personne le jour précédent celui où elle commence à recevoir de telles prestations, calculé sur une base annuelle et ajusté suivant les règles que déterminera son régime de retraite.

Toutefois, le jour précédent celui où une personne commence à recevoir des prestations en vertu de son régime de retraite ne peut être antérieur au jour précédent son âge normal de retraite.

Dès qu'une personne reçoit, en application du premier alinéa, des prestations de retraite, elle cesse de cotiser au régime de retraite qui lui est applicable; de même, dans ce cas, cesse la contribution de son employeur.

Aux fins du présent article, l'expression «traitement» a le sens qui lui sera donné par le régime de retraite applicable à cette personne.

16. Une convention collective au sens du Code du travail ou au sens de la Loi sur les relations du travail dans l'industrie de la construction ou une sentence arbitrale qui en tient lieu, qui est en vigueur le 1^{er} avril 1982 et qui régit des salariés pour lesquels existe ou est en vigueur à cette date un régime de retraite auquel s'applique la Loi sur les régimes supplémentaires de rentes, continue d'avoir effet, malgré les modifications à la Loi sur les normes du travail édictées par la présente loi, jusqu'à la date de son expiration.

Le premier alinéa s'applique, avec les adaptations nécessaires, à un décret au sens de la Loi sur les décrets de convention collective ou au sens de la Loi sur les relations du travail dans l'industrie de la construction, qui est en vigueur le 1^{er} avril 1982 et qui régit de tels salariés, jusqu'à la date de son expiration, de sa prolongation ou de son renouvellement.

Les modifications à la Loi sur les régimes supplémentaires de rentes édictées par la présente loi n'ont d'effet, à l'égard des salariés visés au présent article, qu'à compter de la date d'expiration de cette convention collective ou de cette sentence arbitrale, ou qu'à compter de la date d'expiration, de prolongation ou de renouvellement de ce décret.

17. Une convention collective au sens du Code du travail ou une sentence arbitrale qui en tient lieu, qui est en vigueur le 1^{er} avril 1982 et qui régit des participants aux régimes de retraite visés à l'article 13, continue d'avoir effet, malgré les modifications à la Loi sur les normes du travail édictées par la présente loi, jusqu'à la date de son expiration.

Le premier alinéa s'applique, avec les adaptations nécessaires, à un décret au sens de la Loi sur les décrets de convention collective, qui est en vigueur le 1^{er} avril 1982 et qui régit ces participants, jusqu'à la date de son expiration, de sa prolongation ou de son renouvellement.

Le premier alinéa s'applique également, avec les adaptations nécessaires, à un règlement du gouvernement ou du Conseil du trésor, qui est en vigueur le 1^{er} avril 1982 et qui fixe les conditions de travail applicables à ces participants, jusqu'au 1^{er} janvier 1983.

18. Les modifications à la Loi sur les normes du travail édictées par la présente loi ne s'appliquent qu'à compter du 1^{er} janvier 1983 à l'égard des participants visés aux paragraphes 1^o et 2^o de l'article 13 qui sont régis par une convention collective, une sentence arbitrale ou un décret de convention collective dont l'expiration, la prolongation ou le renouvellement, selon le cas, survient entre le 1^{er} avril 1982 et le 1^{er} janvier 1983.

19. Les modifications à la Loi sur les normes du travail édictées par la présente loi s'appliquent à un salarié qui est régi par une convention, une sentence arbitrale qui en tient lieu, un décret ou par un régime de retraite, sous réserve des articles 10 à 18, et qui sont en vigueur le ou après le 1^{er} avril 1982.

Aux fins du présent article, les mots «salarié», «convention» et «décret» ont le sens qui leur est donné par l'article 1 de la Loi sur les normes du travail ou de la Loi sur les relations du travail dans l'industrie de la construction.

20. Les modifications à la Loi sur les normes du travail édictées par la présente loi ne s'appliquent pas à un salarié visé à l'article 19 qui, avant le 1^{er} avril 1982:

1^o a été congédié, suspendu ou mis à la retraite pour le motif qu'il avait atteint ou dépassé l'âge ou le nombre d'années de service à compter duquel, selon la convention, la sentence arbitrale qui en tient lieu ou le décret qui lui était applicable ou selon la pratique alors en usage chez son employeur, il était mis à la retraite;

2^o a reçu un avis de congédiement, de suspension ou de mise à la retraite pour le motif énoncé au paragraphe 1^o.

21. Les modifications à la Loi sur les régimes supplémentaires de rentes édictées par la présente loi ne s'appliquent pas à un salarié qui, le 1^{er} avril 1982, a atteint ou dépassé l'âge normal de la retraite et est bénéficiaire de sa rente de retraite.

22. Le ministre du Travail, de la Main-d'oeuvre et de la Sécurité du revenu est chargé d'évaluer les effets de la présente loi et de

déposer devant l'Assemblée nationale du Québec ou, si elle ne siège pas, auprès de son président, deux rapports triennaux sur ce sujet, le premier au plus tard le 1^{er} octobre 1985 et le deuxième au plus tard le 1^{er} octobre 1988.

23. La présente loi entre en vigueur le jour de sa sanction.



1982 CASHRA ANNUAL CONFERENCE

Retirement - Something "Different" or
a Euphemism for Dismissal?

(Article taken from Labour Benefits Adviser, Vol. 2,
No. 7 - March 16, 1982)

Panel: Section 15 of the Charter: Age Discrimination

Montebello, Quebec
May 31 - June 2, 1982

RETIREMENT - SOMETHING "DIFFERENT" OR A EUPHEMISM FOR DISMISSAL?

Mandatory or compulsory retirement has attracted much attention recently, even in the general media. The Awards & Decisions portion of this issue notes the most recent court decisions on the matter. The article below puts the whole question of mandatory retirement in a more general perspective of whether it is a matter of pension plan design or personnel policy; examining in particular what is intended by such terms as "retirement" and "normal retirement age".

Some favour it, others oppose it. Some individuals have successfully challenged it as a discriminatory practice under human rights legislation, others have failed. Courts and arbitrators have ruled on it. Everyone who negotiates, administers or is even peripherally involved with a pension plan is concerned with the fight over mandatory retirement. Yet, no one has defined the term "retirement". How can anyone answer the question whether an employee should be mandatorily retired if there is no common ground about "retirement" itself?

Types of "retirement"

The question of what is meant by retirement is not as simplistic as it may sound. Most have a concept of retirement as defined in the dictionary to mean "withdrawal from active service". But, if retirement means actual termination of employment, does it mean termination of *all* employment or termination of employment with a particular employer only? Is it voluntary, involuntary, or both? Furthermore, is retirement merely the act of terminating employment to some degree or is it termination of employment *together with* the qualification for benefits under a pension plan? Or, can retirement be merely the qualification for the benefits without termination of employment?

To the extent that retirement refers to eligibility for a benefit under a pension plan, one would have expected at least a basic definition in pension benefits legislation. Yet, even though the legislation uses "retirement" and "to retire" throughout, there is no definition. Since there is an element of termination of employment with retirement, one would again have expected some clear definitions of the term in employment or labour law. Again, there is no such definition in the legislation and as will be seen shortly, the courts' pronouncements on the question are meaningless.

Interestingly, the only place there is any discussion or distinction between the various concepts of retirement is under the auspices of income tax law.

Income Tax Rules for Retirement

Information Circular
72-13R7 ...

Information Circular 72-13R7 (amended as of December 31, 1981) is published by the Department of National Revenue and sets out the administrative rules regarding pension plan design or content that must be complied with before the Department will register a private pension plan. These rules have never been enacted as law and are merely guidelines drafted and revised periodically at the discretion of the Department. In order to claim the various pension related de-

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ductions under the *Income Tax Act*, however, the pension plan *must* be registered in accordance with the provisions of Information Circular 72-13R7. Therefore, even if these rules are not "law" in the technical sense of enactments or regulations, the practical consequence is the same.

The different 'types' of retirement contemplated by the Department are found in paragraph 10 of the Circular under the heading of "Normal Retirement Age". First of all, the rules require that, "Normal retirement age for purposes of the plan should be defined and should not be before the first day of the month in which the 60th birthday occurs nor later than the day preceding the 71st birthday...". As to what is meant by retirement, the rule provides further, "Normally retirement must constitute a factual termination of employment; however, after a member's 65 (sic) birthday the member may be deemed to have retired for purposes of the plan, *even though remaining in employment*" (*italics added*). So take your choice - with or without termination of employment.

It is generally assumed that there is no law requiring mandatory retirement. If we regard mandatory retirement as the involuntary termination of employment, then the presence of these income tax rules suggests otherwise. Some aspects of the rules are even more restrictive in the requirement of factual termination of employment. In recent years there has developed what is commonly referred to as the "30-and-out" pension, the intent of which is to give the employee the opportunity for a full pension after having served 30 years with the employer, without regard to age at the time of completing the 30 years of service.

The "30-and-out" pension, however, is not quite as simple as that. The rules in Information Circular 72-13R7 stipulate that, "Consideration will also be given to retirement after 30 years of eligible service, without regard to age, *on condition that the employee leave the labour force or be allowed only limited earnings*" (*italics added*). It would be interesting to know how the Department enforces that condition. One suspects that it is quite content that the pension plan merely stipulate the requirements for limited earnings or total withdrawal from the labour force.

For the Department of National Revenue, retirement must be the factual termination of employment only if a person "retires" prior to age 65. Thereafter, "retirement" in its view becomes a matter of receipt of pension benefits. Under the subheading of 'Deferred Retirement' the rules state, "Retirement may be deferred on an optional basis up to the day preceding the individual's 71st birthday, whereupon, for purposes of the plan, retirement must occur. *This requirement does not prevent continued employment after age 71 while in receipt of pension benefits*" (*italics added*). If there is continued employment, however, "Service after the 71st birthday may count for eligibility for coverage *but additional benefits cannot accrue for such service*" (*italics added*). All this under the heading of "Normal Retirement Age".

Normal Retirement Age

If there can be a single root of evil in pension plan design, it must certainly be the invention of the phrase "normal retirement age" and its widespread misapplication.

"Normal retirement age" is often equated with mandatory retirement, that is, in the sense of compulsorily terminating employment. In other words, the term is interpreted to mean that having reached the normal age of retirement as defined in the plan, a person *must* terminate employment. Yet, "normal retirement age" as a matter of pension plan design means nothing more than the age at which a person is eligible for the normal (full) retirement benefit as defined under the plan. If the plan refers to "early retirement age", there is no presumption that having attained that age one must take early retirement, that is, terminate em-

... requires termination
of employment only in
some cases ...

... and only receipt of
benefits in others.

ployment at the early retirement age as defined in the plan. Yet, this presumption exists with "normal retirement age".

The income tax rules help to foster this false presumption by including the requirement to terminate employment in some specified circumstances under the heading of "normal retirement age". The ambiguous nature of the words is further perpetuated in the language of pension plans. Although some are more specific, too many use language similar to that in *Re University of Manitoba and Association of Employees Supporting Education Services*, 27 L.A.C. (2d) 129, for example, where the provision for "Retirement" stated: "The normal retirement date of an employee is the last day of the month in which he/she attains the age of sixty-five (65) years". In that instance the arbitrator held that while the provisions (as quoted above) did not use the words compulsory or mandatory, they must mean "at least, that the university may require an employee to cease work at age 65". Why not say the same about "early retirement age"?

"Normal retirement age" equated with termination of employment

Human rights legislation is often regarded as the saviour in a dispute involving mandatory retirement because of age. Yet, in the case of the *Canadian Human Rights Act* this imprecise term, "normal retirement age", presents a hurdle for anyone attempting to use the *Act* to fight compulsory retirement because of age. Section 14(c) states that it is not a discriminatory practice for purposes of the *Act* if "an individual's employment is terminated because that individual has reached the normal age of retirement for employees working in positions similar to the position of that individual . . .". This provision was subject of a recent interpretation by a tribunal appointed under the *Act* to deal with a complaint based on the compulsory retirement of a flight attendant at age 60 (*Re Campbell and Air Canada - F.D. Jones*, October 28, 1981).

Canadian Human Rights Act perpetuates ambiguity

It was argued before the tribunal that the insurance industry has a special meaning for the term in that "normal age of retirement" means retirement with a full pension. The tribunal, however, rejected the argument that the words constituted a term of art or were being used in any special sense in the *Canadian Human Rights Act*. It ruled that the insurance industry usage cannot be adopted into the *Act* without specific provision to do so and the normal canon of statutory interpretation is that "words are to be given their clear and normal meaning". In view of the preceding discussion of the possibilities under the income tax rules alone, the question arises which "clear and normal meaning" did the tribunal have in mind?

This confusion over the meaning of "normal retirement age" is also present in some of the arguments one hears in opposition to the elimination of mandatory retirement. The criticism is that the objective of unions has been to provide earlier retirement and that the elimination of a mandatory retirement age would frustrate that objective. Such a criticism can only be based on the misconception that mandatory retirement is equal to "normal retirement age" and vice versa. Again, the question must be asked, how can you resolve the debate over mandatory retirement without defining retirement?

Is Retirement Dismissal from Employment?

Retirement not dismissal
- Bell Canada case

If mandatory retirement is the involuntary "factual termination" of employment, the obvious question is whether mandatory retirement is in fact dismissal from employment. To date, the legal position seems to be the Supreme Court of Canada decision in *Bell Canada v. Office and Professional Employees' International Union, Local 131* (1973) 37 D.L.R. (3d) 561, in which the majority ruled that retirement is not discharge or dismissal.

In the *Bell Canada* case, the employee was subject to a company pension plan which provided that where the employee had reached age 60 and worked 20 or

more years the employee "may at the discretion of the Committee be retired from active service and shall thereupon become entitled to and shall be granted pensions". The arbitrator had ruled that "retirement" in this case was a form of dismissal and, therefore, subject to the collective agreement provisions that dismissal must be for sufficient and reasonable cause only.

The majority of the Supreme Court of Canada, however, held that the provision in the collective agreement dealing with dismissal for sufficient and reasonable cause, "cannot possibly be read as 'dismiss, or suspend, or retire on pension'. Until the words 'retire on pension' appear in . . . the collective agreement, there can be no basis for the arbitrator's decision. Dismissal, suspension and retirement on pension are three different and distinct concepts". This latter statement has been applied almost invariably arbitrators.

The majority decision in the *Bell Canada* case is correct as far as it goes - that is, dismissal, suspension and retirement on pension are three different concepts. That conclusion, however, does not define what constitutes retirement. Which of the types of retirement, as exemplified by the income tax rules, did the Supreme Court have in mind? Furthermore, the statement that dismissal and retirement are different does not preclude the possibility that retirement may in fact amount to dismissal, even though different from what is normally referred to as dismissal for cause.

This aspect of the problem was noted by Mr. Justice Laskin in his dissenting opinion in the *Bell Canada* case when he stated: "Is it so clear that a unilateral discretionary termination of service, such as occurred under the company-administered plan, must be held, as a matter of law, not to be a dismissal because the company refers to it as a retirement? "Retire" is both intransitive and transitive in the dictionaries, and certainly the grievor did not retire but was retired. In plain English, he was put out of his job". The recent Supreme Court decision in the *Etobicoke* case (see *infra, Awards & Decisions*) may, however, signal a changing attitude on the part of the Court towards the termination of employment aspect of "retirement".

Some Observations

Once it is patently acknowledged that the act of involuntarily "retiring" someone is tantamount to dismissal of some form, then many other aspects of the problem will fall into place. Those who try to sit on the fence over the issue of abolishing mandatory retirement offer the comment that the real solution is to improve the level of retirement income. True, in some instances. But, in the cases that have been before the courts one does not hear pleas of poverty.

In the *Stevenson* case, for example, (see *Adviser* Vol.2 p.31) the matter was put in terms of the "objective is to preserve his quality of life. It is not merely a matter of compensation . . . he is eager to continue to practise his skills as a pilot and as an accepted member of the work force". To borrow an expression from the *Etobicoke* case, to characterize resistance to mandatory retirement as economic would also be "impressionistic". What one detects in these cases is the resentment of the act of being "put out of his job". Improving the pension benefits would certainly assist those who *desire* and *choose* to terminate employment earlier, but it does not solve the issue of those persons who do not wish to terminate employment and are perfectly competent to continue in that position or profession.

As we move towards having to justify involuntary termination of employment under the guise of retirement, there will be the inevitable demands for legislative guidelines (see *Etobicoke* case, *infra*, for some indication of the evidentiary problems). Who is going to take that initiative? Existing pension and labour

Retirement is being
"put out of job"

Resistance to retirement
not always for economic
reasons

law legislation is silent on the matter. As for pension reform, the Ontario Royal Commission on the Status of Pensions specifically took no position as to the "protected age for right of employment" (see *Adviser Vol.1 p.49*). Even though the Department of Revenue has promulgated some rules on the matter, one would have to question its legal jurisdiction to do so - especially in relation to those rules requiring termination of employment.

The ubiquitous debate over pension reform suggests that reform is merely a matter of resolving the question of division of Canada Pension Plan funds among the federal and provincial government and the private pension industry. In abstract terms a pension plan is nothing more than an investment vehicle. But, in reality, our pension system has developed with a substantial baggage of personnel policies which have to be reformed as well. The realization must come, and shortly, that pension reform is more than a question of dividing captive funds amongst a few select investors.

Pension reform involves more than question of money

Notwithstanding the above comments, it is readily acknowledged that the dispute over the abolition of mandatory retirement will continue under the auspices of human rights legislation. Forthcoming issues will examine the problems presented by the varying provisions of human rights legislation from one jurisdiction to the next with respect to discrimination on the basis of age.

AWARDS & DECISIONS

MANDATORY RETIREMENT: MANITOBA COURTS WILL STILL DECIDE WHETHER DISCRIMINATORY

Parkinson v. Health Sciences Centre (Manitoba Court of Appeal - January 26, 1982) - Manitoba Court of Appeal distinguishes Supreme Court of Canada decision in *Seneca College v. Bhaduria*.

As in the *McIntire* case (see *Adviser Vol.1 p.43*) this case also involved the question whether mandatory retirement at a specified age was a discriminatory practice under *The Human Rights Act* of Manitoba.

Dr. Parkinson was a member of the practising staff of the Health Sciences Centre which had a by-law providing that members of the active staff shall "retire on June 30th next following their sixty-fifth birthday".

The main problem for the court in this instance, however, was not whether the by-law was discriminatory under *The Human Rights Act*. That aspect of the question had in effect been decided by the *McIntire* case. The main issue was the effect of the Supreme Court of Canada decision in *Seneca College v. Bhaduria* (see *Adviser Vol.2 p.30*).

The *Seneca College* case involved an allegation of discrimination under the *Ontario Human Rights Code*. In the *Seneca College* case the Supreme Court of Canada held basically that the *Ontario Human Rights Code* had its own method of enforcement and

only that method could be used (i.e. complaint procedures before the Commission). Therefore, any action in the courts based on common law or on a breach of the *Code* was not permissible.

The difficulty for the Manitoba Court of Appeal at this point was whether it could proceed with Dr. Parkinson's case in view of the *Seneca College* decision, since in this instance Dr. Parkinson was applying not to the Human Rights Commission under the *Act*, but directly to the Court under its rules of procedure requesting a declaration from the Court that the Health Sciences Centre's by-laws were invalid and contrary to the provisions of *The Human Rights Act*.

As the Court stated, "unless the *Seneca College* case can be distinguished we are bound to follow it in the present case". The Manitoba Court of Appeal distinguished it on the following two grounds.

Declaration is Not an Action

First of all, it held that unlike the *Seneca College* case, "no action in the usual sense of that term was brought here. Rather the plaintiff moved the Court for a declaratory order under the Queen's Bench Rules 536 and 537". It went on to state that Dr. Parkinson's rights depended on the construction of the *Act* and of the by-law; he merely sought an order declaring and determining those rights.

The Court of Appeal also held that the *Seneca Col-*

lege case was distinguishable as a result of the terms of section 34 of *The Human Rights Act* of Manitoba which provide that any person who deprives another of the rights granted under the *Act* "may be restrained by an injunction issued in an action in the Court of Queen's Bench brought by any person against the person. . .". In other words, *The Human Rights Act* itself provided for a person bringing an action directly to the Court rather than the Commission.

It was noted that there was no section equivalent to section 34 in the *Ontario Human Rights Code* which at once distinguished the *Seneca College* case from the *Parkinson* case.

Comment: It is important to note that the decision in this case is based mainly on the specific provisions of the Manitoba *Human Rights Act*. Otherwise, one must assume the law to be as stated by the Supreme Court of Canada in the *Seneca College* case.

On the same day as the *Parkinson* case, the Manitoba Court of Appeal also released its decision in *Newport v. The Government of Manitoba* which held that the Manitoba *Civil Service Superannuation Act* was subject to *The Human Rights Act*, therefore, overruling the mandatory retirement at age 65 provision (section 54) in the *Superannuation Act*.

Despite these recent court decisions on the effects of human rights legislation on the matter, the dispute over mandatory retirement because of age is still alive and well in Manitoba.

Objective Test of Age Needed

Although the decision in the *Parkinson* case was unanimous, one of the judges (Hall J.A.) felt that even though he was bound to declare the by-law invalid, ". . . what is in need of amendment is not the by-law of the Health Sciences Centre but rather the provisions of *The Human Rights Act*. The rights created in that statute should not be asserted in general and absolute terms. . . the rights of non-discrimination in favour of medical staff must be consonant with the rights of patients. . . Some objective test of age is required; otherwise equality of opportunity, based upon bona fide qualifications, becomes the risk of the patient".

It was noted recently (Toronto *Globe and Mail*, Feb. 20/82) that despite the recommendations of a one-man inquiry that mandatory retirement be abolished in Manitoba, the Manitoba government will not be acting immediately on this recommendation and is requesting further public input on the whole question.

MANDATORY RETIREMENT: NO INJUNCTIONS FROM ONTARIO AND B.C. COURTS

Stevenson v. Air Canada et al. (Ontario Divisional Court - January 19, 1982)

On September 3, 1981, a judge of the Ontario Supreme Court had granted Captain Stevenson an interim injunction restraining Air Canada from mandatorily retiring him on his sixtieth birthday until his complaint of discrimination under the *Canadian Human Rights Act* was disposed of by the federal Commission (see *Adviser* Vol.2 p.30 for details of that decision).

Air Canada appealed that ruling to the Divisional Court which granted the appeal and Captain Stevenson, consequently, lost his injunction.

In granting the appeal, the Divisional Court adopted similar reasons to that given by the judge in *Lamont v. Air Canada et al.* (see *Adviser* Vol.2 p.31 for details of that decision) where under similar circumstances the judge refused to grant an injunction. The Divisional Court also referred to the decision by a B.C. Supreme Court judge on September 29, 1981 (*Chambers v. Canadian Pacific Air Limited*) where again under similar circumstances a pilot was refused an injunction.

As to the technical requirements for an injunction, the Court held that "the purpose of an injunction, it has frequently been said, is to keep intact the *status quo* pending the outcome of litigation. The effect of the order (granting the injunction) is not to preserve the true *status quo* but to alter it in favour of the plaintiff. The *status quo* is that represented by the collective agreement and the policy of the defendant company under which the plaintiff has been employed for many years, namely that employment terminated at age 60 and such termination was automatic upon reaching that age".

Comment: Other than the technical points of the injunction itself, there were some peripheral comments about mandatory retirement which may be of some interest to anyone attempting to rationalize the various judicial interpretations of the question.

The observations as to the effects delayed retirement may have on more junior employees are particularly noteworthy. In this Court's opinion junior pilots "have been employed in the expectation that their opportunities will increase on the occasion of each retirement" of the senior pilots reaching age sixty. It went on to state, "delayed promotions are delayed increases in earnings. It is apparent, therefore, that not only does the balance of convenience

favour the defendants, but substantial financial loss may be occasioned by the continuation of this order".

One should be very careful in pursuing that line of argument. What if at some point in the future, as some commentators predict, there will be insufficient junior employees to meet the demand. Does that mean that senior employees would or should then be forced to remain in employment so that junior employees can carry out their duties effectively?

The judicial system's traditional approach to a problem is that if there is wrongdoing resulting in damages, then the court will award monetary compensation for those damages. In the case of mandatory retirement, money may not necessarily be either the issue nor the solution.

The judge who granted the injunction initially stated that it was not "merely a matter of compensation" and acknowledged that the pilot's objective in restraining his employer was "to preserve his quality of life . . . to continue to practise his skills as a pilot and as an accepted member of the work force".

The Divisional Court was of a different view, however, and held that: "The only thing that could not be regained by the plaintiff would be the opportunity he would have had for an indefinite period of time to continue to exercise his profession and to achieve satisfaction from that exercise. If the latter is a head of damages that would be recognized by this court, as to which I express no opinion, it is still a matter for which compensation could be given in the form of a monetary award and the harm suffered by the plaintiff would not therefore be irreparable . . .". It seems that the B.C. judge in *Chambers v. Canadian Pacific Air Limited* was of the same view.

Inasmuch as sometimes the law is too important to be left in the hands of the lawyers, mandatory retirement is probably too important an issue to be left in the hands of the courts.

MANDATORY RETIREMENT AGE: AS A BONA FIDE OCCUPATIONAL QUALIFICATION

The Ontario Human Rights Commission et al. v. The Borough of Etobicoke (Supreme Court of Canada - February 9, 1982) - interpretation of age as a bona fide occupational qualification under the

Ontario Human Rights Code - nature and sufficiency of evidence required to establish such qualification.

In this case the Supreme Court of Canada ruled on the interpretation of s.4(6) of the *Ontario Human Rights Code* which exempts the application of the *Code* wherever "age, sex, or marital status is a bona fide occupational qualification and requirement for the position or employment".

Firefighters in the Borough of Etobicoke were subject to a collective agreement provision requiring compulsory retirement at age sixty. Two of the firefighters whose employment was terminated under that provision filed a complaint under the *Ontario Human Rights Code*.

The board of inquiry hearing the complaints held that the compulsory retirement provision amounted to a refusal to employ or to continue to employ contrary to the *Human Rights Code*. Furthermore, the board rejected the employer's defence that compulsory retirement at age 60 constituted a "bona fide occupational qualification and requirement for the position" in accordance with the exempting provision under the *Code*.

The Ontario Divisional Court allowed the employer's appeal and a further appeal by the firefighters to the Court of Appeal was unsuccessful. The firefighters then appealed to the Supreme Court of Canada which allowed the appeal and held in their favour for the following reasons.

The Supreme Court noted that in a case such as this, where the human rights legislation specifically prohibits discrimination between the ages of 40 and 65, in order to fall within the exemption the employer has the burden to prove on "a balance of probabilities" that the compulsory retirement was a bona fide occupational qualification and requirement for the employment concerned.

According to the Court the two questions that had to be answered were: first, what is a bona fide occupational qualification and requirement within s.4(6) of the *Code* and, secondly, was it shown by the employer that the mandatory retirement provisions complained of could so qualify?

Test of Bona Fide Occupational Qualification

As to what constitutes a bona fide occupational qualification the Court stated: "To be a bona fide occupational qualification and requirement a limitation, such as a mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate perfor-

mance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the *Code*. In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public".

As to the answer to the second question, the court stated, "In an occupation where, . . . the employer seeks to justify the retirement in the interests of public safety, to decide whether a bona fide occupational qualification and requirement has been shown the board of inquiry and the court must consider whether the evidence adduced justifies the conclusion that there is sufficient risk of employee failure in those over the mandatory retirement age to warrant the early retirement in the interests of safety of the employee, his fellow employees and the public at large".

"Impressionistic" Evidence not Sufficient

The Supreme Court held that the evidence adduced by the employer in this case was inadequate to discharge the burden of proof. It noted that, as the board of inquiry had remarked, the employer's evidence was largely "impressionistic".

As to what kind of evidence would be necessary, the Court stated that "it would be unwise to attempt to lay down any fixed rule covering the nature and sufficiency of the evidence required to justify a mandatory retirement below the age of sixty-five under the provisions of s.4(6) of the *Code*". Nevertheless, in "dealing with the question of a mandatory retirement age it would seem that evidence as to the duties to be performed and the relationship between the aging process and the safe, efficient performance of those duties would be imperative".

Furthermore, the court was not about to state emphatically that scientific evidence would be necessary in all cases. However, it went on to say that "... in cases such as this statistical and medical evidence based upon observation and research on the question of aging, if not in all cases absolutely necessary, will certainly be more persuasive than the testimony of persons, albeit with great experience in firefighting, to the effect that firefighting is 'a young man's game'".

As for the fact that a mandatory retirement age had been agreed upon in the collective agreement, the court held that although "the *Code* contains no explicit restriction on such contracting out," as a mat-

ter of public policy the parties cannot contract themselves out of the provisions of the *Code* and any contracts attempting to do so are void.

Comment: Although this case has been referred to as "another nail in the coffin" of mandatory retirement, it is suggested that the Supreme Court decision may not have such far-reaching implications. It may or may not reflect a changing attitude within the Supreme Court towards mandatory retirement, but it still leaves sufficient room for an employer to impose mandatory retirement under certain circumstances.

First of all, it must be emphasized that this decision deals only with the provision under human rights legislation which makes certain exceptions to the "protected age". The Court's decision in this instance does not directly affect compulsory retirement at age 65 or over (that is, beyond the protected age). It stated specifically that when faced "with the uncertainty of the aging process an employer has it seems to me, two alternatives. He may establish a retirement age at age 65 or over, in which case he would escape the charge of discrimination on the basis of age under the *Code*" (italics added).

Furthermore, the Supreme Court did not rule out the possibility of establishing mandatory retirement as a bona fide occupational qualification. It has indicated what it considers to be the nature of the evidence required to establish mandatory retirement age as a bona fide occupational requirement and ruled that *in this case* the employer failed to establish the burden of proof required.

This does not preclude the possibility of an employer satisfying that burden of proof. It merely means, as the decision states, the evidence required would have to be more than "impressionistic".

At the moment, all attention is being focussed on age as the criterion of mandatory retirement. One may abolish outright the right to "retire" (i.e. terminate employment of) an employee solely because of age, but that does not resolve the question of how to terminate an employee for such reasons as declining competence and an infinite number of factors directly related to the capability of continued performance of the occupation or profession.

To determine the procedures and criteria necessary for that process requires a detailed examination of what it actually means to "be retired". Rather than eliminating mandatory retirement, it is suggested that the Supreme Court of Canada decision in the *Etobicoke* case may be the catalyst for the necessary refinement of the term "retirement".



1982 CASHRA ANNUAL CONFERENCE

Affirmative Action

An Explanation of its Evolution (Part I)
The Objectives of Special Programs (Part II)
Canada's Record in the 70's (Part III)

by

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Panel: Systemic Discrimination - The Canadian Experience

Montebello, Quebec
May 31 - June 2, 1982





NEWSLETTER NEWSLETTER NEWSLETTER

RECEIVED/RECU

MAR 13 1980

CH 7 FEB 1980

VOL. 9, NO. 1

AFFIRMATIVE ACTION: AN EXPLANATION OF ITS EVOLUTION

PART I

In this, the first of a three part series, SHRC Assistant Director Shelagh Day explains what is meant by Affirmative Action. In Part I Ms. Day discusses the recent developments in Human Rights case law which have set the stage for the creation of programs which address discrimination in social, rather than individual, terms.

Discrimination: Expanding Definitions

In the last decade there has been a remarkable change in our general understanding of social history and tradition. This has occurred because native and Indian people, women, and most recently, the disabled, have begun to describe social history from their various points of view.

As a result, we have become much more aware of the broad and damaging effects of many previously unexamined traditions, assumptions, and stereotypes.

The fact that these traditions and assumptions have had a significant impact on the lives of the many members of these groups has led us to recognize that the present problems experienced by them are group problems, not individual ones.

This recognition of the pervasive and discriminatory effect of traditions and common assumptions on whole groups has had an important impact on the law.

At the most fundamental level, it has caused an expansion in our definition of discrimination.

Initially, discrimination was seen as overt, isolated acts motivated by prejudice. But this definition is clearly inadequate, since it cannot explain the broad scope of problems experienced by whole groups of people.

Increasingly then, legislators, experts in the human rights field, and courts acknowledge that the most damaging discrimination does not result from isolated, individual acts motivated by prejudice, but rather from historical assumptions and traditions which have become embedded, even unintentionally, in the normal operations of our employment, education, and social institutions.

The law, therefore, no longer defines discrimination as simply individual, or identifies it by intent. Increasingly, the law defines discrimination as systemic, and identifies it by impact.

This shift in the understanding of discrimination is apparent in recent case decisions in both the United States and Canada.

Systemic Discrimination

Perhaps the first decision which provided an analysis of "systemic discrimination" and "adverse impact" was the 1971 U.S. decision in the case of *Griggs v. Duke Power Co.*

This decision was handed down in response to a complaint from a black man named Griggs who alleged that he had been discriminated against because of his race when he was refused a janitorial job with Duke Power Co. on the grounds that he did not have a Grade 12 education.

Griggs argued that the Grade 12 requirement had the effect of screening out proportionately more black people because of their lower level of educational achievement and that the Grade 12 requirement was not necessary to satisfactorily perform the job in question.

The court ruled in Griggs' favour and found that discrimination occurs when a decision that cannot be justified by business necessity has the effect of screening out one class of persons at a significantly higher rate than others.

The court, then considered the effect of a practice on black people as a group, and defined discrimination not by the intent of the act but by its impact. Chief Justice Warren Burger wrote at the time, "... practices, procedures... neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory... practices... the thrust of the (Civil Rights) Act (is directed) to the consequences of... practices, not simply the motivation."

Malice not a Factor

In recent Canadian case law, a similar understanding of discrimination has been articulated.

In Ontario, in 1978, a Board of Inquiry hearing the complaint of *Mr. Ishar Singh v. Security Investigation Services Ltd.* ruled in favour of the complainant who alleged that he had been discriminated against

Cont'd on P. 2, Col. I

because of his religion when he was refused a job as a security guard because he wore the turban and beard required by his Sikh faith.

In this case, the Board of Inquiry found that the employer bore "no ill will towards Sikh people, . . . had no intention to insult or act with malice . . . and did not have the intention or motive of discrimination."

However, the Board found that the effect of the employer's policy, which required that their security guards be clean-shaven and wear caps, was to deny employment to Sikhs, and it ruled that intention was not necessary to establish a contravention of human rights legislation.

These concepts of "systemic discrimination" and "adverse impact", which are now articulated in the law, are also useful in examining the matter of accessibility for disabled people. Inaccessibility has an adverse impact on a whole group of people, yet that effect was probably unintended. We have not built transportation systems and buildings as we have in order to exclude the disabled, but the effect of many simple and traditional design factors is to exclude them, and that effect is discriminatory.

Implications for Human Rights Investigations

There are several benefits which flow from this recent analysis and redefinition of discrimination.

First, it has provided us with a much more accurate and objective method of determining when discrimination is occurring. We can measure the effect of a practice or procedure on an objective basis, rather than searching for motive.

And, secondly, it removes guilt and blame from the social arena, since we are able to recognize that what we are dealing with is the pervasive effects of history and tradition, not the effects of individual acts of bigotry nor the individual failures of native persons, or women, or the disabled.

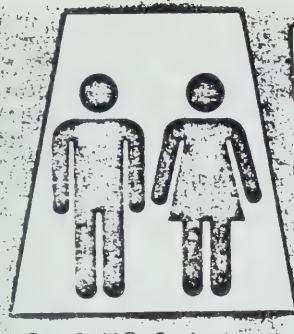
Affirmative Action

Most importantly, however, the change in general understanding of social history and the new definitions in the law have made clear the need for affirmative action.

The fact that many social traditions have had an adverse impact on whole groups of people, the fact that these traditions remain embedded in the normal operations of our employment and education systems and continue to have a discriminatory effect, clearly demonstrate the need for intervention if these groups are to enjoy **in fact** the equality which the law promises.

Affirmative action is the strategy which has been developed in recent years to counteract and eliminate systemic discrimination. It is a method for identifying and eliminating barriers, and for assisting those groups of people who have suffered the effects of past discrimination to achieve equality in our employment and educational systems.

The value of affirmative action is that it is a strategy based on a realistic assessment of the scope and nature of the problem, and it is also practical and effective in its application.



NEWSLETTER NEWSLETTER NEWSLETTER

RECEIVED/265
A 24 1980
SHRC/CORP

VOL. 9, NO. 2

MARCH/APRIL 1980

AFFIRMATIVE ACTION: THE OBJECTIVES OF SPECIAL PROGRAMS PART II

In this, the second of a three part series, SHRC Assistant Director Shelagh Day explains the objectives of Affirmative Action programs. In Part 1 of this series, which appeared in the last issue of the Newsletter, Ms Day discussed the recent developments in human rights case law which set the stage for the creation of programs which address discrimination in social, rather than individual terms.

Affirmative Action is the most comprehensive strategy which has been developed to address and eliminate discrimination.

There are two basic reasons for the development of affirmative action programs in Canada. First, many employment and education systems, through their normal operations, have inadvertent discriminatory effects, and they therefore perpetuate historical patterns of disadvantage for people of native ancestry, women, and people with physical disabilities. The fact that these discriminatory effects are unintended and often result from seemingly neutral practices does not in any way lessen the need to identify these practices and alter them where that is possible. Individual complaints filed under human rights legislation have not been effective in eliminating "systemic discrimination" and there is clearly a need for a strategy broader in scope that deals with systems and their effects as a whole.

Second, because of historical patterns of discrimination and disadvantage, some groups within our society are far behind and cannot compete on an equal footing for available opportunities in employment and education.

In other words, for the groups that are disadvantaged there are two problems. Those that are already qualified for different or better opportunities are often barred from them by systemic practices which have inadvertent discriminatory effects. And those that are not already qualified or eligible for different or better opportunities need extra assistance to overcome the historical patterns of discrimination and disadvantage that have been placed in their path.

To address these two problems, affirmative action programs have two major components: the elimination of systemic practices which act as barriers, and the establishment of special measures within employ-

ment and education systems to assist disadvantaged groups to overcome the effects of past practices.

Instituting either one of these components without the other will not be sufficient. The elimination of systemic barriers will bring neutrality to employment and education systems but simple neutrality is not enough. Certainly the elimination of these barriers will assist those individuals in the disadvantaged groups in taking advantage of previously unavailable opportunities, however, such a situation will not help those who are not qualified because of the disadvantage they have experienced.

On the other hand, providing special measures to assist the members of disadvantaged groups will not in and of itself eliminate systemic practices which act as barriers. If these barriers are not eliminated, the same exclusionary factors will be in place when the special measures are dropped. Consequently, both components are necessary for effective affirmative action programs.

Systemic Barriers

What is meant by "systemic barriers"? In the field of employment, a number of practices and procedures have been identified which can act as barriers for native peoples, women, and people with physical disabilities. For example, where a group of jobs within an employment system are held predominantly by white males a word-of-mouth recruitment procedure will tend to keep knowledge of job vacancies within that same group and therefore have the effect of excluding native people and women from competing for those job opportunities. Also, inflated or non-job-related requirements, such as a requirement for Grade 12 or a requirement that applicants meet certain height and weight standards, will bar competent native people and women from jobs they could perform. Work sites which are inaccessible will prevent people with mobil-

ity disabilities from working in jobs which they may well be qualified for and able to perform.

These are examples of "systemic barriers". They are practices or procedures which are normal and look neutral but which have discriminatory or exclusionary effects and are not necessary to the operation of the business or organization.

In the field of education, we can also identify factors which have discriminatory effects. For example, in the seventies, many studies were done which identified the streaming of girls and boys in the schools into those disciplines and occupations that are traditional to their sex. The streaming effect appears to be, the result of indirect, not overt, practices. Among those identified are the sex-stereotyping of occupations in school books and course materials and the lack of role models in fields or positions which are not traditional to the child's sex. For native children, the absence of native languages, culture, values, and history in standard course curricula and the lack of native role models in the schools also appears to have a negative effect on their achievement.

In employment and education, then, these are the kinds of inadvertent and systemic practices which affirmative action programs are designed to identify and remove.

Special Measures

In employment, special measures can take many forms depending on the nature of the business or the service being provided. Some such measures are active recruitment and hiring strategies which will move people of native ancestry, women, and people with physical disabilities into positions which they have not previously had the opportunity to attain. Another special measure is training programs which will give members of these groups skills they do not presently have.

In education, there are already some special measures designed specifically to assist native people. At the University of Saskatchewan College of Law, for example, there is a special pre-law program, accredited by all common-law schools in Canada, which is designed to prepare native people who may not have the usual prerequisites for entrance into Canadian law schools.

In both employment and education, affirmative action programs also function to identify needs and create those special measures which will speed access to opportunities for members of disadvantaged groups.

Goals and Timetables

Goals and established timetables for meeting those goals provide a planning and measuring structure for affirmative action programs. It is possible to measure, on a statistical basis, the distribution of opportunities and the distribution of the benefits which flow from those opportunities across the various groups within our society, and across the groups within any particular organization.

Since the objective of affirmative action programs is to create a more equitable distribution of opportunities and benefits, it is essential that each organization engaging in such programs identifies the goals it is attempting to reach so that the steps to achieve those goals can be planned and progress towards them can be measured.

In conclusion, then, whether in employment or education, affirmative action programs have two major components — the elimination of systemic barriers and the creation of special measures to assist disadvantaged groups — and both of these are established within the planning and measuring framework of goals and timetables.

AFFIRMATIVE ACTION: CANADA'S RECORD IN THE 70'S PART III

In this, the last of a three part series, S.H.R.C. Assistant Director Shelagh Day describes the development of affirmative action programs in Canada. In Parts I and II of this series, Ms. Day discussed the changes in interpretation of the law, which have contributed to a new systemic approach to eliminating discrimination, and the objectives of special programs. Copies of this series may be obtained from any S.H.R.C. office.

In Canada in the 70's, human rights legislation in most jurisdictions has been changed to provide for affirmative action programs, and a number of programs intended to eliminate discrimination and improve opportunities for disadvantaged groups have been developed.

The need to go beyond the complaint mechanism and the traditional non-discriminatory provisions, previously relied upon, has been recognized in the last decade in all but three of Canada's eleven jurisdictions. Only Quebec, Alberta and Newfoundland do not yet have provisions for affirmative action programs in place.

The Legal Basis For Affirmative Action

While the language of the legislative provisions varies somewhat from jurisdiction to jurisdiction, basically the statutes allow for the development of special programs to overcome disadvantages experienced by persons of Indian ancestry, women and persons with physical disabilities, or any other target groups which need special assistance. In addition, most provide that, subject to the approval of the appropriate Human Rights Commission, such special programs are not in violation of the standard non-discriminatory provisions of the legislation.

The importance of this last provision, which amounts to a statutory declaration that programs designed to overcome discrimination are not themselves discriminatory, has been underlined recently by two case decisions in Alberta where human rights legislation does not include a provision for affirmative action programs.

In the first of these, a Board of Inquiry ruled in February, 1980 that a special program for native students, which admitted them to University of Calgary courses and provided special tutoring for them, was discriminatory because a non-native woman was refused admission to this program.

In the second case, the Athabasca Tribal Council, appearing before the Energy Resources Conservation Board in June, 1979, proposed that the ERCB should require the implementation of a special employment program for local native people as a condition of their approval of a new project to develop the tar sands in northeastern Alberta.

When the ERCB declined to make that requirement on the grounds that it might be discriminatory, the Athabasca Tribal Council appealed to the Alberta Court of Appeal. On April 30th of this year, the Court of Appeal ruled in a split two-one decision that "the establishment of affirmative action programs would require amendments to the Individual Rights Protec-

tion Act similar to those in a number of other provinces expressly exempting such programs from the operation of the statute."

It is interesting to note that, shortly after these two decisions were handed down in Alberta, the government introduced amendments to the Individual Rights Protection Act which, once approved, will allow for Cabinet approval of affirmative action programs.

In the 70's, then, legislation has been introduced to allow for affirmative action programs and to protect their legal status. Clearly, the programs, the legislative provisions, and the statutory protections are all needed.

The Development of Special Programs

As legislation has been developing, so have programs.

Most Canadian programs have emerged in response to pressure from women, which has been exerted since the *Report of the Royal Commission on the Status of Women* was published in 1970, and in response to pressure from Metis, Indian and Inuit people in the North who want to ensure that jobs created by new development in their areas go to local people and not only to workers imported from the South.

During the 70's, the Federal Liberal Government developed an Equal Employment Opportunity Program for women in the Public Service, and most provincial governments took some steps in the same direction.

Manitoba, under the NDP, developed a New Careers Program to provide training and employment opportunities for disadvantaged peoples, and a number of municipal governments and private sector employers have also developed programs during this last decade.

In northern Alberta and Saskatchewan, AMOK and SYNCRODE have contracted to provide special programs for the employment of the northern native people, and the Foothills pipeline is expected to follow a similar course as well.

The PQ Government of Quebec has introduced a separate statute requiring affirmative action in education and employment to assist the disabled. And, the Social Credit Government of British Columbia has introduced a new and significantly improved set of standards for building accessibility for the disabled.

In addition, there have been numerous studies done on the status of women in Canadian school systems and universities, and on the problems of streaming and stereotyping of female children. Many recommendations have been made about changes in curriculum and staffing which would improve the atmosphere and conditions for children of Indian ancestry in our schools. There is a much greater emphasis now on accommodating disabled children within the regular school systems by providing the necessary equipment

and aides. And a number of initiatives have been taken to provide women's studies programs, Indian studies programs, and special programs for the training of native and Indian lawyers, social workers and teachers.

These recent initiatives in both employment and education (and in accessibility provisions which, for the disabled, affect their opportunities in both employment and education) manifest a general, growing and non-partisan recognition that positive interventions must be made to assist these disadvantaged groups.

Effective Programs

We cannot afford, however, in spite of this shopping list of programs and studies, to be complacent about the initiatives being taken. The effectiveness of many Canadian programs for the disadvantaged has been diluted by timidity, by wobbling political commitment, by piecemeal rather than system-wide programming, by the lack of planning and clear goals, and by the assignment of responsibility for programs to persons who are not given the authority to effectively carry them out.

Fortunately, we do have enough experience in Canada to be able to identify the factors which mark effective programs.

Broad Impact

As well as being concerned about the effectiveness of the programs we initiate, we must also be concerned about whether enough programs are being initiated to have a significant impact on the status of groups that are broadly disadvantaged.

Most programs in Canada are voluntary. The problem with this is that it results in a program here and a program there, but not in programs embracing the majority of employment and education systems so that a broad, positive impact on the status and opportunities of disadvantaged groups is achieved.

The simplest method of achieving that broad impact is through contract compliance which would require any organization contracting with or receiving monies from the various levels of government to have an approved affirmative action program.

Some new development projects in the North are already working under contract conditions of this kind and, though it received little attention at the time, affirmative action requirements for all federal contractors was one of the federal Conservative Party's campaign promises at the time of the last election.

Instituting affirmative action conditions in government contract requirements is a sound way of using public monies to overcome traditional inequities, and if voluntary programs do not appear to have significant impact, contract compliance is likely to receive much more attention and consideration across Canada in the 1980's.

The Newsletter is an official publication of the Saskatchewan Human Rights Commission. Signed articles do not necessarily express the official views of the Commission and are printed in the interest of public discussion.

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1982 CASHRA ANNUAL CONFERENCE

(EXTRACT)

Eliminating Discrimination in Employment

A Compelling National Priority

(The U.S. Equal Employment Opportunity Commission
July 1979)

Panel: Systemic Discrimination - The Canadian Experience

Montebello, Quebec
May 31 - June 2, 1982

Eliminating Discrimination in Employment A Compelling National Priority

**A handbook for state, county, and
municipal governments**

**The U.S. Equal Employment Opportunity Commission
July 1979**

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ACKNOWLEDGMENTS

The Commission wishes to express its appreciation to staff of all the Federal agencies whose programs are described in this publication for contributing materials, reviewing several drafts and providing valuable comments and suggestions.

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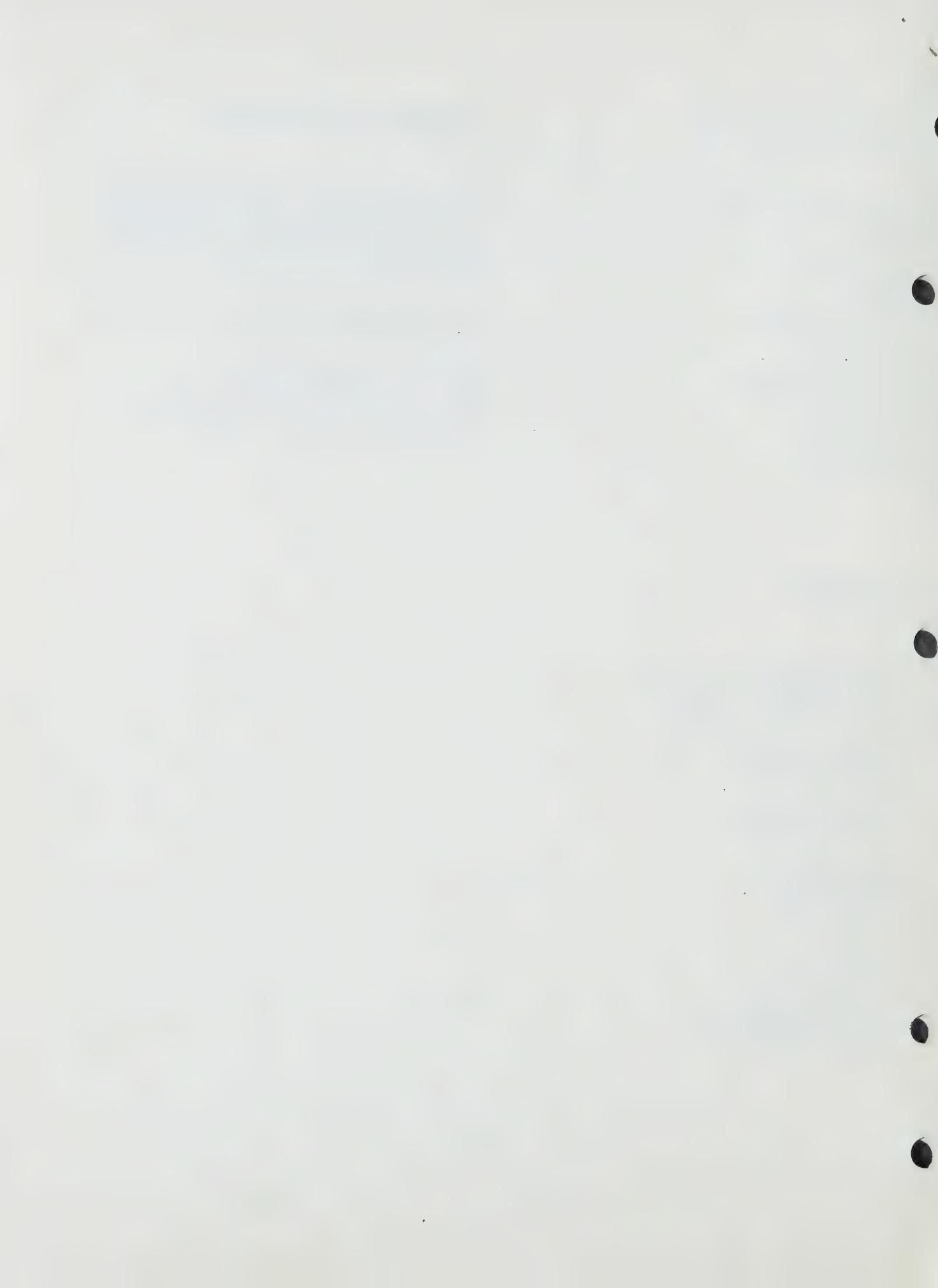
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II. PROHIBITED DISCRIMINATION

A. THE HISTORICAL EVOLUTION

Many public employers honestly believe that they do not discriminate. They may think they are conducting equal employment opportunity policies and programs—and yet may be discriminating, in violation of the law.

Why is this so? The chief reason is that the legal standard and definition of *what constitutes discrimination* and *what is required to eliminate it* has substantially evolved in the process of enforcing equal employment law in the past 10 to 15 years. It is essential that employers understand what discriminatory practices are in order to comply with the law.

When Title VII was enacted in 1964 (and earlier, when "fair employment" legislation was enacted in many states) many employers and others believed that discrimination consisted of conscious, overt acts of ill-will or bias, and identifiable unequal treatment of individuals or groups on the basis of their race, color, religion, national origin or sex.

Identifying discrimination, under such a definition, would require evidence of "intent" or specific acts of unequal treatment. And the remedies to eliminate discrimination would focus on redress for the affected individuals and elimination of such actions in the future.

Experience in administering fair employment laws, and particularly the knowledge gained in administering Title VII, has provided better understanding of the complex and pervasive manner in which discrimination operates. To a considerable extent, acts of overt bias and unequal treatment have diminished since 1964 (although such actions by no means have disappeared and are the basis of many discrimination suits), yet discrimination continues to have persistent, destructive impact upon minority groups, women and others, confirmed daily by bleak statistics of unemployment and underemployment, by wide disparities in incomes, and by the specific findings of the courts, the Congress and the agencies administering equal employment laws.

The most pervasive discriminatory practices now are recognized to result from seemingly neutral policies and practices within basic employment systems. However neutral they appear, however neutral and benign in intent, these systems produce

highly discriminatory effects; neutral practices also *perpetuate discriminatory effects* of past discriminatory practices.

Congress explicitly recognized this more complex, *systemic* definition of discrimination in passing the Equal Employment Opportunity Act of 1972, which extended Title VII coverage to state, local and Federal governments, and gave the Equal Employment Opportunity Commission additional enforcement powers.¹

Discrimination under the law today is determined by the *consequences* or *effects* of employment practices, as well as by their intent, and frequently may affect whole "classes" of persons, rather than merely individuals. Remedies required to eliminate discrimination include not only redress for identified individuals and groups, but actions to remove all "artificial . . . and unnecessary barriers to employment when (these) barriers operate *invidiously* to discriminate on the basis of racial or other impermissible classification."²

B. "CONSEQUENCES . . . NOT INTENT"

The landmark 1971 Supreme Court decision, *Griggs v. Duke Power Co.*³ established the present legal standard of discrimination under Title VII, which requires that practices must be measured by their *consequences and effects*, not merely by motive or intent.

The *Griggs* decision cited Congressional intent, in enacting Title VII to eliminate continuing effects of discrimination caused by historical, social, and economic factors, as well as discrimination resulting from actions of individual employers. The decision supported the perception of discrimination which had been articulated in *Guidelines* and legal arguments of the Federal agency administering this law from 1966-1971. The key phrase of this decision declares:

If an employment practice which *operates to exclude* (Negroes) cannot be shown to be *related to job performance* the practice is *prohibited . . .* (emphasis supplied).

The Court further stated that:

. . . practices, procedures, tests . . . neutral on their face and even neutral in terms of intent

cannot be maintained if they operate to freeze the status quo of prior discriminatory practices . . . Congress directed the thrust of the Act to consequences of employment discrimination, not simply the motivation.

The Supreme Court in 1979 re-emphasized the importance of consequences and effects of discrimination to justify voluntary action by an employer taken to correct the influence of external discrimination on its workforce and to avoid the possibility of liability for perpetuating such discriminatory patterns. The Court has also found affirmative action by a public employer to eliminate effects of discriminatory practices a factor in requiring dismissal of an employment discrimination complaint challenging such practices.⁴

In *Griggs*, the court established, and a subsequent stream of court decisions has affirmed, that employment practices or standards which have "adverse impact" on ("operate to exclude") groups protected by Title VII are illegal ("prohibited"), and must be eliminated, unless the employer can demonstrate that they are required by "business necessity".⁵

"Business necessity" has been defined in *Griggs* and subsequent court decisions to require demonstration by the employer that a practice is essential to effective job performance. There also should be an investigation of *alternatives* which may achieve the legitimate business purpose with less exclusionary effect.

This basic legal standard was recently reiterated by the Supreme Court when it found a public employer's seemingly neutral selection qualifications discriminatory because of "adverse impact" on women, and the employer's failure to demonstrate that these requirements had "a manifest relation to the employment in question."⁶

To eliminate discrimination, it is essential that employers know how to identify and measure "adverse impact", and understand what is meant by "business necessity" and "job-related" procedures.

C. "STATISTICS OFTEN TELL MUCH AND THE COURTS LISTEN"

"Adverse impact" is initially determined by statistical measurements which indicate that employment standards or practices "operate to exclude".

Statistics alone are not conclusive proof of discrimination. But they are routinely viewed by courts and compliance agencies as "prima

facie"—or initial—evidence that discrimination may be or may have been operating, evidence which shifts the burden of proof to the employer to justify practices responsible for these statistics.⁸

"Adverse impact" has been measured in a number of different ways: The Supreme Court recently stated one basic "statistical" guide:

... absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which employees are being hired.⁹

This concept, expressed in many Title VII cases, underlies requirements in Federal programs for contractors and grant recipients, for "result oriented" affirmative action plans, with workforce analyses and numerical goals and timetables geared to relevant population and workforce.¹⁰

The law does *not* require a rigid statistical balance or "parity" between an employer's workforce and external labor force measures. The "explanation" referred to above by the Supreme Court might consist of legitimate "job-related" factors, justified by provable "business necessity."¹¹

However, where representation of racial or ethnic minorities or women differs substantially from the relevant labor force in any job category, function, department or agency, there is a strong legal presumption that discriminatory practices may be responsible. Employers should carefully examine present and past practices to discover which may have operated—or are operating—"to exclude."

This examination, variously termed "self-analysis", "self-audit", "self-evaluation" or "utilization analysis", is *required* by many laws prohibiting employment discrimination.¹² Even where not legally required, an analysis is essential for every employer, as a practical self-monitoring process, to determine whether or not an employment system may be discriminatory.

Another type of statistical measurement is illustrated by the Supreme Court's finding that the State of Alabama's height and weight requirements "operated to exclude" women from employment as correctional counsellors. The Court used two statistical measures:

(1) a comparison of the percentage of women in the State's population (52.75 per cent) and its workforce (36.89 per cent) with the percent holding correctional counsellor jobs (12.9 per cent).

(2) The court also found that the combined height and weight requirements would "operate to exclude" 41.3 per cent of women in the national population but less than 1 percent of men. (The Court found no reason to believe the impact in the State would be significantly different from that in the nation).

In this case the Court specifically did not require a comparison of women applicants to women hired because:

The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of self-recognized "inability to meet the very standards challenged as being discriminatory."¹³

Another means of showing "adverse impact" applied to the employer's *selection system* (which does not include all other aspects of an employment system, such as recruitment) appears in the *Uniform Guidelines on Employee Selection Procedures (UGESP)* adopted in 1978 as a common standard for all Federal agencies enforcing employment discrimination law. The fundamental principle underlying the *UGESP* is that employer policies or practices which have an adverse impact on employment opportunities of any race, sex, or ethnic group are illegal unless justified by business necessity.

"Business necessity" has been very narrowly interpreted by the courts (for public agencies, the term "operational necessity" sometimes is used). The employer must demonstrate overriding evidence that a practice which causes adverse impact is "necessary to safe and efficient operation" of the enterprise.¹⁴

"Business necessity" includes a requirement that the employer demonstrate that a procedure or practice with adverse impact is essentially "job related" (a requirement that courts have interpreted closely following the standards initially defined in *EEOC Guidelines on Employee Selection Procedures*,) and now articulated in the *UGESP*). "Business necessity" also includes the concept that where a suitable alternative procedure or practice can accomplish the legitimate business purpose with lesser adverse impact, the more exclusionary practice cannot be regarded as a "necessity."¹⁵

One court succinctly told a public employer: "No (discriminatory) practice is 'necessary' unless *no reasonable alternative* to the action exists."¹⁶

The courts have given great deference to the requirements and technical standards of EEOC's

Guidelines on Employee Selection Procedures in determining procedures which constitute prohibited discrimination.¹⁷ It is expected that equal, if not greater deference will be given to the revised *Uniform Guidelines on Employee Selection Procedures*, reflecting common standards for the entire Federal government.¹⁸

The *UGESP* define "adverse impact" as a "substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group."¹⁹ The *UGESP* provide a "rule of thumb" as a "practical means of determining adverse impact," indicating that a selection rate of less than 4/5 (or 80 percent) of the selection rate for the group with the highest selection rate generally will be regarded as evidence of adverse impact. (However, several important exceptions to this "rule of thumb" are specified).²⁰

An employer who identifies a selection procedure which causes adverse impact, must discontinue the use of that procedure unless one of the following conditions is met: (1) the selection process is modified to eliminate the adverse impact;²¹ or (2) a validation study has been completed which meets the requirements of the *UGESP*;²² or (3) the requirements for interim use of a procedure are met;²³ or (4) the employer can otherwise justify the use of the procedure under Federal law.²⁴

"Selection procedures" include job requirements (physical, education and experience); evaluations of applicants or employees; interviews; ranking, certification, performance, paper and pencil tests; performance in training, or probationary periods and any other procedures used to determine hiring, job assignment, promotion, transfer, selection for training, demotion, dismissal or other employment decisions.

The employer who does not wish to undertake the extensive technical process of validation has a choice of using other job-related procedures which eliminate adverse impact, modifying or changing existing procedures or using them in a manner which serves legitimate business needs but eliminates the impact. In conducting a validation study, the *UGESP* require the employer to include an investigation of alternative procedures or use of procedures which will achieve its legitimate business purpose with lesser adverse impact.²⁵

Failure to do this led a court to reject an otherwise adequate validity study submitted by a public employer, in the first decision rendered after issuance of the new *Uniform Guidelines on Employee Selection*

Procedures. The judge quoted specific language in the preamble to the UGESP which cautions that: "The employer cannot concentrate solely on establishing the validity of the instrument or procedure which it has been using in the past"²⁶

The UGESP provide specific help to employers in identifying discriminatory practices. The UGESP indicate that employers first should focus on the *end result* of their selection process, to identify whether there is adverse impact. In addition, an employer should conduct a "utilization analysis", comparing representation of minorities and women, by job categories, with their representation in the relevant labor force. The UGESP focus on determining impact in the *selection process*, and comparison of applicant/hire rates, but identifying impact in the *entire employment system* requires comparison with the external labor market because of possible discriminatory limitation of applicants.²⁷

A first step of an internal workforce analysis is the EEO-4 Report Form required to be *filed* annually with the EEOC by larger public employers (information for this form must be collected and *maintained* by *all* covered employers). This form indicates workforce composition (by specified race, national origin and sex groups) for major functions (departments), job categories and pay levels. The EEO-4 can be an "early warning system" for the employer, when compared with availability of persons from each racial/national origin/sex group in the relevant labor market.²⁸

EEO report forms (including EEO-5 and EEO-6 required for public educational institutions) are used by the EEOC and by *every Federal agency monitoring nondiscrimination compliance* under Federal grant and contract compliance programs.

A full-scale "utilization analysis" requires more detailed examination of job classifications and job progressions within the broad EEO categories, to identify specific areas of exclusion, concentration and barriers to advancement. Where significant disparities appear, the employer should look for practices which may be "operating to exclude."

Where the overall utilization analysis shows significant disparities, a further statistical analysis should measure each major *element* of the employment process—including *recruitment, testing, ranking, certification, and all selection criteria and procedures; job-assignments, transfers, training, disciplinary actions, terminations, compensation, and benefits*, to see if any of these procedures have disparate impact on minorities or women, and if so, if they are "job-related" and justified by "business/

operational necessity." The UGESP provide specific guidance for conducting such an analysis of component elements of the *selection process*.²⁹

D. ELIMINATING DISCRIMINATION IN PUBLIC EMPLOYMENT

In extending Title VII to state and local governments in 1972, Congress explicitly incorporated the body of case law already developed under Title VII for private employment to apply to public employees.³⁰ Congress specifically applied the "Griggs" definition of discrimination to public employment practices, citing the greatly changed "technical perception" of discrimination since 1964 and concluding:

Discrimination . . . today is (more) . . . a problem of . . . "systems" and "effects" . . . than . . . intentional wrongs.³¹

The Supreme Court has recognized and relied upon this clear intent of Congress to apply the same legal standards developed for private employment to public employers and employees.³²

Congress found evidence of "exclusion" of minorities and women in public employment "more pervasive than in the private sector", resulting from both overt and institutional "systemic" practices.³³ Among the "systemic" discriminatory practices which Congress cited were:

- *de facto* segregated job ladders;
- invalid selection techniques;
- supervisor stereotypes about minority groups; and
- "civil service selection and promotion techniques . . . with artificial requirements that place a premium on 'paper credentials'."³⁴

The Congress concluded that:

Many civil service rules and procedures . . . may themselves constitute systemic barriers to minorities and women.³⁵

Questions have been raised about application of the Griggs "adverse effect" standard to public employers, following a 1976 Supreme Court decision (*Washington v Davis*).³⁶

This case did *not* change the standard for public employers under Title VII.³⁷ The *Washington v. Davis* suit was filed *before* Title VII applied to public employers, under the "equal protection" clause of the 14th Amendment to the Constitution. Before 1972, private discrimination suits against public employers were brought under constitutional protec-

tions, and courts generally followed Title VII legal standards, finding discrimination based on statistical "adverse impact" in these cases. In *Washington v. Davis*, the Supreme Court made three important distinctions:

First, in constitutional cases (which may affect broad social policies far beyond employment discrimination) the Court will look for some stronger indication of purposeful intent, more than mere "adverse impact" to make a *prima facie* finding of discrimination when the employer shows a "rational" reason for a practice.

Second, this general "constitutional" standard is not as "rigorous" as that which Congress clearly requires under Title VII for public employment; therefore in public employment cases under Title VII "adverse impact" is prohibited unless the employer can provide a sufficient "business necessity" defense.

Third, in the *Davis* case itself, the public employer had made impressive efforts to overcome original "exclusion" of blacks, and in fact, current practices did not have adverse impact; blacks were being hired and constituted a proportion of the employer's workforce reasonably related to their representation in the relevant labor area.

Since most public employment litigation today is brought under Title VII and other major statutes prohibiting unjustified discriminatory effect, regardless of intent, the applicable standard is the "adverse impact" definition of discrimination developed in the *Griggs* doctrine.³⁸

The legal definition of discrimination in this chapter has focused on interpretations of the law prohibiting employment discrimination on the basis of *race, color, religion, sex or national origin* as developed under Title VII. To a considerable extent, similar concepts have been applied by the courts in interpretations of the law prohibiting *age* discrimination; statistical data is used as *prima facie* evidence, and the employer is required to justify actions which have "adverse impact" on the basis of age with proof of "business necessity" and "job-relatedness."

Recent legislation prohibiting discrimination on the basis of *handicap* incorporates similar principles. This legislation also recognizes that providing equal employment opportunity for handicapped persons involves a legal obligation for the employer to make "reasonable accommodation to special needs of such

persons" where such accommodation can be made without undue hardship on conduct of the employer's business. The precise definition of what constitutes "undue hardship" remains an evolving legal issue, but it is clear that the *intent* of all laws described in this *Handbook* is to overcome "unnecessary barriers," not essentially related to job performance, which have operated to deprive significant segments of our population of equal employment opportunities.³⁹

FOOTNOTES—CHAPTER II

¹ *Legislative History of the Equal Employment Opportunity Act of 1972*, pp. 68-69, 1113-1116, 1844. H. R. Report No. 92-238, 92nd Cong. 1st Sess. pp. 5, 10, 14, 17 (1971); *Sen. Report No. 92-415*, 92nd Cong. 1st Sess. p. 10, 414.

² *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)

³ *Ibid.*

⁴ *United Steelworkers of America v. Weber* 99 S. Ct. 2721 (1979); *Davis v. County of Los Angeles*, 99 S. Ct. 1379 (1979).

⁵ *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). *Morrow v. Crisler*, 491 F. 2d 1053 (5th Cir. 1974) cert. denied 419 U.S. 895 (1974); *Carter v. Gallagher*, 452 F. 2d 315, (8th Cir. 1971) cert. denied 406 U.S. 950 (1972); *Vulcan Society v. N.Y. Civil Service Commission* 360 F. Supp 1265 (S.D. N.Y. 1973) aff'd. in relevant part 490 F. 2d 387 (2nd Cir. 1973); *Jones v. N.Y.C. Human Resources Administration*, 528 F. 2d 696 (2nd Cir. 1976), cert. denied 429 U.S. 825 (1979).

⁶ *Dothard v. Rawlison*, 433 U.S. 321 (1977), 512 L. Ed. 2d 786. But see, *New York City Transit Authority v. Beazer*, 77 U.S.L.W. 4317 (March 27, 1979), in which the Supreme Court found that notwithstanding possible adverse impact, a rule disqualifying user of unauthorized narcotics from employment had a manifest relationship to legitimate employment goals of safety and efficiency. Compare, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1978), in which the Court suggested that a blanket policy disqualifying all persons with a record of unlawful behavior from employment would not have a manifest relationship to legitimate employment goals.

⁷ *State of Alabama v. U.S.*, 304 F2d 583, (5th Cir. aff'd per curiam, 37. U.S. 37 (1962)). This phrase is frequently quoted in court decisions to indicate the importance of statistics in establishing a *prima facie* case of discrimination.

⁸ *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission*, 482 F. 2d 1333 (2nd Cir. 1973), cert. denied 421 U.S. 991 (1975); *Afro American Patrolmen's League v. Duck*, 503 F. 2d 294 (6th Cir. 1974). *Rogers v. International Paper Co.*, (510 F. 2d 1340, 1348 (8th Cir. 1975); *Carter v. Gallagher*; *supra*. See also, *Teamsters v. U.S.*, 431 U.S. 324 (1977), indicating that statistical evidence may also constitute a *prima facie* case of purposeful discrimination.

⁹ *Hazelwood School District v. U.S.*, 433 U.S. 299 (1977); quoting *Teamsters v. U.S.*, *supra*, n.2 (1977).

¹⁰ *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971), cert. den. 404 U.S. 854; *Associated General Contractors of Massachusetts v. Alisthuler*, 490 F. 2d (1st Cir. 1973), cert. denied 416 U.S. 957 (1974).

¹¹ Another "explanation" for present statistical disparities might be proof that disparities are entirely the result of discriminatory practices that occurred prior to the effective date of Title VII. *Hazelwood School District v. U.S.*, *supra*. However, this would place a heavy burden on an employer to demonstrate unequivocally that such practices ceased to exist subsequent to this date. *Teamsters v. U.S.*, *supra*.

¹³ Laws and Regulations thereunder which require this type of self-analysis, self evaluation or utilization analysis include:

State and Local Fiscal Assistance Act of 1972, as amended (1976) (General Revenue Sharing); Title II, Public Works Act of 1976, as amended; Executive Order 11246, as amended; Standards for a Merit System of Personnel Administration; Rehabilitation Act of 1973, as amended: Section 503; 504; Omnibus Crime Control and Safe Streets Act of 1968, as amended; Juvenile Justice and Delinquency Prevention Act of 1974, as amended; Comprehensive Employment Training Act of 1973, as amended; State Employment Service; (Labor Department EEO Regulations); Apprenticeship and Training Programs: EEO Regulations; Housing and Community Development Act of 1974; Federal Highway-Aid Act of 1968, as amended; Urban Mass Transportation Act of 1964, as amended; Airport and Airways Development Act Amendments of 1976; Railroad Revitalization Act of 1976; Title IX of the Educational Amendments of 1972; Public Works and Economic Development Act of 1965, as amended; Economic Opportunity Act of 1964, as amended; State Cooperative Extension Service: EEO Regulations (See Chapter IV for further details).

¹⁴ *Dothard v. Rawlinson, supra*. See also, *Hazelwood v. U.S., supra*, in which the Court indicated that without reasons "compelling" a contrary conclusion, the potential applicant pool for a suburban school district would be the entire metropolitan area.

¹⁵ *Robinson v. Lorillard*, 444 F. 2d 719 (4th Cir. 1971) cert. dismissed 404 U.S. 1000 (1971). See also *Griggs v. Duke Power Co., supra*; *Dothard v. Rawlinson, supra*; *Muller v. U.S. Steel Corp.*, 509 F. 2d 923, 928 (10th Cir.), cert. denied 423 U.S. 825 (1975); *Head v. Timken Roller Bearing Co.*, 486 F. 2d 870, 879 (6th Cir. 1973); *U.S. v. St. Louis-San Francisco Ry. Co.*, 464 F. 2d 301, 308 (8th Cir. 1972), cert. denied 409 U.S. 1116 (1973); *U.S. v. Bethlehem Steel Corp.*, 466 F. 2d 652, 666 (2nd Cir. 1971); *U.S. v. Jacksonville Terminal Co.*, 451 F. 2d 418, 451 (5th Cir. 1971), cert. denied 406 U.S. 906 (1972).

¹⁶ Even where a validity study has been done, a selection procedure with adverse impact may still be unlawful where there is evidence that other suitable selection procedures with less adverse impact exist. *Albemarle v. Moody, supra*; *Dothard v. Rawlinson, supra*; *U.S. v. City of Chicago (Police)*, 549 F. 2d 415 (7th Cir. 1977); cert. denied, 434 U.S. 875 (1977). *Vulcan Society v. Civil Service Commission, supra*; *U.S. v. Georgia Power Co.*, 474 F. 2d 706 (5th Cir. 1973) *U.S. v. Chicago (Fire)*, 573 F. 2d 416 (7th Cir. 1978).

¹⁷ *Crockett v. Green*, 388 F. Supp. 912, 920 (E.D. Wis 1975) aff'd 534 715 F. 2d 715 (7th Cir. 1976). See also *Watkins v. Scott Paper Co.*, 530 F. 2d 1159 (5th Cir. 1976), cert. denied 429 U.S. 861 (1976).

¹⁸ See for example, *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Firefighter's Institute for Racial Equality v. City of St. Louis*, 549 F. 2d 506, 510 (8th Cir.), cert. denied 434 U.S. 819 (1977). *U.S. v. City of Chicago*, 549 F. 2d 415, 427 (7th Cir.), cert. denied 434 U.S. 875 (1977). *Kirkland v. New York State Department of Correctional Services*, 520 F. 2d 420, 426 (2d Cir. 1975), cert. denied 429 U.S. 823. *Douglas v. Hampton*, 512 F. 2d 976, 986.

¹⁹ A Federal court decision three days after issuance of the new *Uniform Guidelines on Employee Selection Procedures* relied heavily on their detailed technical requirements, appraising a city's validity study and other practices against *Guidelines* "standards" in the same way predecessor EEOC *Guidelines* have been used by the courts. This court found that the city's validity study of an examination did not meet three basic *Guidelines* requirements: (1) the employer had not investigated suitable alternative selection procedures and suitable methods of using . . . selection procedures which have as little adverse impact as possible; (2) did not properly justify setting a cutoff score; and (3) did not properly justify rank

ordering of candidates. *Allen et al v. City of Mobile et al*, 464 F. Supp. 433 (1978). 18 FEP Cases 217.

²⁰ See *Uniform Guidelines on Employee Selection Procedures*, Appendix A, Section 16B.

²¹ *Ibid.* Section 4D. See also *Questions and Answers on Uniform Guidelines on Employee Selection Procedures*; Appendix A. (Questions 10-28).

²² See *Uniform Guidelines on Employee Selection Procedures*, Appendix A. Section 6.

²³ See *Uniform Guidelines on Employee Selection Procedures*, Appendix A. Sections 3A; 3B; 16X.

²⁴ See *Uniform Guidelines on Employee Selection Procedures*, Appendix A. Section 5J.

²⁵ See *Uniform Guidelines on Employee Selection Procedures*, Appendix A, Section 6B.

²⁶ See *Uniform Guidelines on Employee Selection Procedures*, Appendix A. Sections 3B; 5G; 5H; 6A; 16X.

²⁷ *Allen v. City of Mobile, supra*. n. 18

²⁸ See *Hazelwood School District v. U.S., supra*, 433 U.S. at 312, in which the Court noted that special efforts by one area employer to attract minorities might influence the labor market by increasing the number of minorities available. Similarly, widespread discrimination by area employers against minorities and women may have resulted in an artificial limitation of the labor pool and may make necessary a utilization comparison with a broader external workforce.

²⁹ See Appendix C-2 for instructions on collection and filing of EEO-4 data.

³⁰ See *Uniform Guidelines on Employee Selection Procedures*, and *Questions and Answers on the Uniform Guidelines on Employee Selection Procedures*, Appendix A, Questions Nos. 12-24.

³¹ *Ibid.*

³² *Dothard v. Rawlinson, supra*; see also *Manhart v. City of Los Angeles, Department of Water and Power*, 435 U.S. 702 (1978). Supreme Court decisions also indicate that a public employer may take affirmative action based on race, sex, or national origin to correct effects or patterns resulting from discrimination, without any finding that the effects were caused by action of the particular employer. Compare, *United Steelworkers of America v. Weber, supra*. (private employer justified in taking affirmative action to correct "traditional patterns of segregation"), with *Davis v. County of Los Angeles, supra*. (a public employer's affirmative action to eliminate potential adverse effect of selection examination on minorities is a factor requiring dismissal of a discrimination complaint based on the examination).

³³ *Legislative History of the Equal Employment Opportunity Act of 1972*, pp. 61, 77-79, 197-98; 418-419, 1113-1114.

³⁴ *Ibid.* pp. 423, 1114.

³⁵ *Ibid.* p. 423.

³⁶ *Washington v. Davis*, 423 U.S. 224-7 (1976).

³⁷ In *Washington v. Davis* the Court clearly distinguished Title VII requirements from requirements under the Constitution, when it stated, in part: "Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of Blacks are challenged, discriminatory purpose need not be proved, and . . . it is . . . insufficient . . . to demonstrate some rational basis . . . for the challenged practices. It is necessary . . . that they be 'validated' in terms of job performance . . . determining whether (they) are appropriate for selection of qualified applicants for the job in question. . . . (T)his process involves a more probing judicial review of, and less deference to the seemingly reasonable acts of administrators and executives. . . . We are not disposed to adopt this more rigorous standard for . . . purposes of applying the Fifth

and Fourteenth Amendments . . . (I)n our view, extension of (this) rule beyond those areas where it is already applicable by reason of statute, such as . . . in . . . public employment should await legislative prescription." (Emphasis supplied). Now that Title VII has been amended to cover state and local governments this "more rigorous standard" applies to their actions.

²⁴ See *Dothard v. Rawlinson*, *supra*, *U.S. v. Chicago (Fire)* *supra*; *U.S. v. Chicago (Police)* *supra*. In addition, a significant statistical showing of underrepresentation or exclusion of minorities in the workforce constitutes a legal *prima facie* case of purposeful discrimination. *Hazelwood School District v. U.S.* *supra*. Statistics showing adverse impact of hiring, promotion,

compensation and other employment procedures on minorities or women also constitute a legal *prima facie* case of discrimination where those employment decisions are made by the subjective judgement of non-minority male managers. See, for example, *Wade v. Mississippi Cooperative Extension Service*, 362 D. Supp. 126 (D.C. Miss. 1974); 528 F. 2d 508 (5th Cir. 1976).

²⁵ Recently, the EEOC issued proposed *Guidelines on Discrimination Because of Religion*. The concept of reasonable accommodation without undue hardship as developed in these guidelines does not apply to the Rehabilitation Act of 1973, as amended, or to regulations under the Act. See Appendix A. EEOC proposed *Guidelines on Discrimination Because of Religion*.



1982 CASHRA ANNUAL CONFERENCE

Notes of Address

by

Jack R. London
Dean of Law
University of Manitoba

Panel: Section 15 of the Charter: Age Discrimination

Montebello, Québec
May 31 - June 2, 1982

JACK R. LONDON, DEAN OF LAW
UNIVERSITY OF MANITOBA

Notes of Address

to

*1982 CASHRA CONFERENCE
Montebello, Quebec
June 1, 1982*

AGE DISCRIMINATION - SECTION 15 OF THE CHARTER OF HUMAN RIGHTS

Opening remarks.

Before looking generally at age discrimination in the context of the Charter, specifically mandatory retirement, I think it important to remind ourselves of yesterday's plenary session on the Charter and its impact. I want to make three points which will set the stage and context for my remarks on the particular subject at hand this morning:

1. *It was clear from listening to the panel, and several of the very competent people who commented, that there is no concensus, nor is there likely to be a concensus until we*

actually have decisions emanating from our courts, on several fundamental points, including:

- (a) The extent to which the Charter will reach beyond the legislative function into programs of either the public or private sector;
- (b) The extent to which the Charter will affect private transactions;
- (c) Whether or not there is a presumption in favour of the constitutional validity of legislation which, nevertheless, *prima facie* draws discriminatory distinctions between groups or individuals;
- (d) What is the stringency of the onus of proof and by whom is it borne;
- (e) What criteria will be adopted in determining whether or not a form of discrimination is defensible on the basis that it is "reasonable";
- (f) Whether the adopted criteria on the stringency of review will be uniform for all matters raised in Section 15 or will vary with the particular equality provision or form of discrimination involved;

(g) And, lastly, whether under the "equal benefit clause", governments may be compelled to provide protection and programs to the disadvantaged or to equalize the recipients of benefits and, if so, on what basis.

2. However, common sense, experience and Section 1 of the Charter, make one thing absolutely clear; and, that is that the protections and guarantees of the Charter are not absolute but, being subject to "reasonable limits", will be evolved over time and redefined from time to time. Their evolution over time, and hence the effect of the Charter from time to time, particularly the Section 15 protections, will vary with the composition of the courts; the dominant social, economic and political circumstances of the era; and, the tenacity and determination of human rights advocates and administrators in affecting public perceptions and sensibilities of human rights issues both through educational programs and through consistent and sensitive championing of the rights of the disadvantaged or victims of discrimination.

3. In interpreting the Charter, it is my view that we ought not to place great reliance either on prior court decisions under the Canadian Bill of Rights, legislation which simply is not comparable to the Charter, or indeed, decisions of the Supreme Court of the United States on the American "equal protection clause" which literally has one-quarter the conceptual breadth and potential of Section 15. Already, if you peruse the materials distributed in your kits, and some of the commentary at this Conference, you will note a narrowing of our vision by the constant references to these two sources, without adequate acknowledgment of the differences in time, place and conditions.

The spirit of the Canada Act, including the Charter, was, and is, to assist in the establishment of a unique Canadian identity. I would suggest that in pursuit of that identity the Charter ought to be interpreted broadly and comprehensively, without the constraint of over reliance on either English or

American jurisprudence. Unlike most entrenched Bills of Rights, this Charter offers a unique possibility to our judiciary. In my view, the opting out power of Section 33, whereby, *inter alia*, a legislature or Parliament may declare the protections of Section 15 to be inapplicable, a provision which is otherwise so lamentable, could be relied on by our courts, if they so choose, as a licence to enforce fully and liberally the rights and protections of Section 15 and the other provisions of the Charter. In so doing, the courts will reserve to themselves the ability to prefer equity to efficiency, utility or economy. In my view, matters of efficiency, utility and economy are better dealt with by the legislative branch, and that overriding power will remain in the legislative branch by virtue of Section 33. That may not have been the exact purpose of Section 33, but it can be its result.

Having said all of that, let me now address the rather narrower topic which has been assigned me by Senator Bird, that is, to do a brief overview of the issue of mandatory retirement in light of the prohibition against age discrimination contained in Section 15 of the Charter and limited by Section 1 thereof. By extending my mandate only slightly, the exercise will serve not only to address mandatory retirement, but also as an example of the way the Charter may actually be made to operate in practice as a major tool against discrimination.

First, let me spend a few moments reflecting on age discrimination, per se. Having myself struggled long and hard with this topic and these remarks, I think it might be useful if I could outline a few of the unique problems one faces in approaching this subject or, at least, articulate a few of the inherent conflicts.

Unlike any of the other specifically prohibited forms of discrimination, with the exception possibly of mental disability, protection against age discrimination faces a number of peculiar and perhaps telling barriers to the kind of literal and liberal interpretation of the Charter protections which one would like to see and which I will adopt when I turn to the issue of the effect of the Charter on mandatory retirement policies.

The other forms of discrimination prohibited in Section 15, certainly those based on race, nationality or ethnicity, colour, religion and sex, more or less are already established, if not universally accepted, concepts which reflect an already changed consciousness in the general community, at least, in terms of the general acceptance of the inevitability of continued progressive change and reform. However, the concept of prohibiting discrimination on the basis of age remains, for many, at least for the moment, in a very different category for at least five reasons:

1. The term "age discrimination" for many describes a series of differentiations which are qualitatively dissimilar. Most often, one hears that age discrimination against the elderly is of a substantially different character than that against the young.
2. Our concern with fair and equal treatment of older and younger people, particularly on issues like mandatory retirement, is much more recent than is the case with the other forms of classification. The concept of "ageism" (look at how uncomfortable we are even with the term) is not yet part, or an accepted part, of our consciousness. There is low public acceptance or concensus on the issue and it is a very rare constitutional proscription.
3. Unlike any of the other classifications in Section 15, perhaps save mental and physical disability, the probability is high that every individual will pass

through various age classifications, that is, the life cycle. Most of us will be young, middle-aged and old. By way of contrast, those of us who are white will never be black; men will not be women; persons born Jewish will not be reborn Gentile and religious conversion will be a matter of choice. Since one of the essences of discrimination must involve the classification or distinction of a sub-group, that is, one cannot discriminate against the whole of humanity, age discrimination is perceived by many to be a misnomer since all persons have at least the potential, and perhaps the probability, of experiencing the results of age group distinctions. Unlike the other forms of stereotype, in other words, age distinctions, and hence the ramifications of age classification, are not permanent, are universal and ought to be perceived differently than other forms of stereotypical behaviour.

I must add that, in my own view, this argument is completely devoid of substance. The issue is whether or not, based on stereotypical assumptions, denial of opportunity and equality are permissible or tolerable at any moment in time. I would say no, and the fact that I too may have been victimized or may one day be victimized seems to me to provide an absurd and irrational defense to the need for protection.

4. Questions concerning age distinctions are essentially matters of social or economic concern (for example, the age of driving or drinking or adequacy of pensions), which traditionally are political matters for the legislature, not fundamental rights questions, involving equal respect of equals, which are the stuff of judicial review. They are complex issues often involving considerations and perspectives which vary from culture to culture, region to region and circumstance to circumstance. They involve

relevant questions of efficiency and safety. The inevitable exception protecting age differentiation based on bona fide occupational qualifications, is a classic example of our past and current recognition that, in this category, matters of efficiency and safety can be paramount to concerns of equity. For these reasons, therefore, it is argued, they are issues for resolution, if not privately, then, at most, in the legislative, not judicial, arena, since the legislative function by its nature can be, and is more likely to be, responsive in a meaningful, comprehensive and beneficial way than is the judicial function.

5. Lastly, intuition combined with common sense and experience leads to the inevitable conclusion that one's age often does determine one's capacity, ability and need, each of which will change over time. Ageing inevitably effects changes in one's being. Ageing is tied to intellectual and physical capacity. The same cannot, and ought not to be

said about race, nationality, ethnicity, colour, religion or sex which by and large have an unreliable correlation with capacity, ability or need. Children of three will not be licenced to drive motor vehicles. The distinction will be drawn and upheld and few, if any, of us will blink an eye. Therefore, age, like mental or physical disability, in many ways is qualitatively different as a descriptor than the other mentioned characteristics.

Notwithstanding these comments, however, one central
and fundamental value remains unchallenged. Denial of opportunity,
based on stereotypical assumptions, is distinctly unlovely, perhaps
even evil. Each of us has the right to be assessed for who and
what we are, not what we are assumed to be. Therefore, I would
hope that the Charter protections and guarantees will be liberally
and broadly interpreted. Any narrowing of the vision of equality
of respect and opportunity would be a tragedy which ought not to
be countenanced either by the people here today or those who succeed
to our positions.

I turn finally, then, to an illustration of that sort of interpretation of the Charter in a particular context, mandatory retirement. I preface my remarks with the caveat that the interpretation is intended to be one of example and, that it is but one of several alternative interpretations and methods of interpretation which might be employed. Indeed, in light of some of the comments from many of our experts on constitutional and administrative law, some of this thesis seems somewhat radical and so is offered tentatively and perhaps partially with an eye towards inviting critical response at the end of the panel.

I have six basic propositions to offer for discussion and debate:

1. It is now clear that compulsory or mandatory retirement at any age, simply on the basis of age, constitutes discrimination. The whole series of Manitoba cases (MacIntyre, Neport and Parkinson) clearly establish that concept, now confirmed by

the Supreme Court in the case of the Etobicoke Fire Fighters.

At worst, strong evidence of actual or potential incapacity is required. Age, alone, is not enough.

2. Mandatory retirement, at any age, simply on the basis of age, with the implementation of Section 15 three years hence, will be unlawful in all public service and public sector employment including all employment authorized by, or flowing from, statute or order-in-council, federal, provincial or municipal (and likely including crown corporations and most judges, except, perhaps, those unprotected because of the B.N.A. Act), because it is discriminatory and offensive to at least two of the Section 15 equalities; equality under the law and equal benefit of the law. In Manitoba, Quebec and New Brunswick, this result obtains, in any event, under their respective Human Rights Codes, the Charter there simply being confirmatory. Where the Human Rights Code does not protect mandatory retirement in the public sector, however, the Charter provisions will.

3. That portion of any provincial or federal Human Rights Code which restricts the age discrimination prohibition to persons below a certain age or which contains clauses effectively allowing mandatory retirement if it is "normal" in the location, industry or community, will likely be effective only if the notwithstanding power of Section 33 of the Charter is activated. It is unlikely, in my view, that blanket age maximums, or their equivalents in any other guise, will be tolerated or defended by Section 1 of the Charter for at least three reasons:

(a) The basic justifications for mandatory retirement usually are argued to be those of efficiency or safety. However, problems of efficiency and safety can be as easily dealt with by enacting or implying an exception for bona fide occupational qualifications, in the unlikely event that a bona fide occupational qualification exception is not already part of the Human Rights Code;

- (b) Because absent some general rule of the community that all persons, employed or self-employed, must cease gainful endeavour at the magic age, mandatory retirement imposes a burden on workers not also imposed on others, which is inherently discriminatory; and,
- (c) Most importantly, because, in my view, it would not be a "reasonable limit demonstrably justified in a free and democratic society" to deprive an individual, on the basis simply of a stereotypical and often inaccurate assumption of capacity, of the following five rights:
 - (i) The right to equality of opportunity based on that person's own unique characteristics and capabilities;
 - (ii) The right to pursue an economically viable existence;
 - (iii) The right to protect and maintain his/her health through remaining productive;
 - (iv) The right to self-respect and self-esteem as a useful and productive human being; and,

(v) The right to status in a society which values more those who work than those who don't and those who are more productive, rather than those who are less productive.

For all these reasons, therefore, I believe, blanket age limitations, or their equivalents, will not be acceptable.

4. Hence, where the provincial or federal code addresses the issue of age discrimination in employment, mandatory retirement simply on the basis of age will be unlawful in the private sector as well as the public sector.

5. If a Human Rights Code does not address the issue of age discrimination in employment, that is, it is silent on the question, two possibilities are open. One is that, absent any reference, mandatory retirement in the private sector will be unlawful. Alternatively, under Section 15 of the Charter such a prohibition might be implied to be part of the

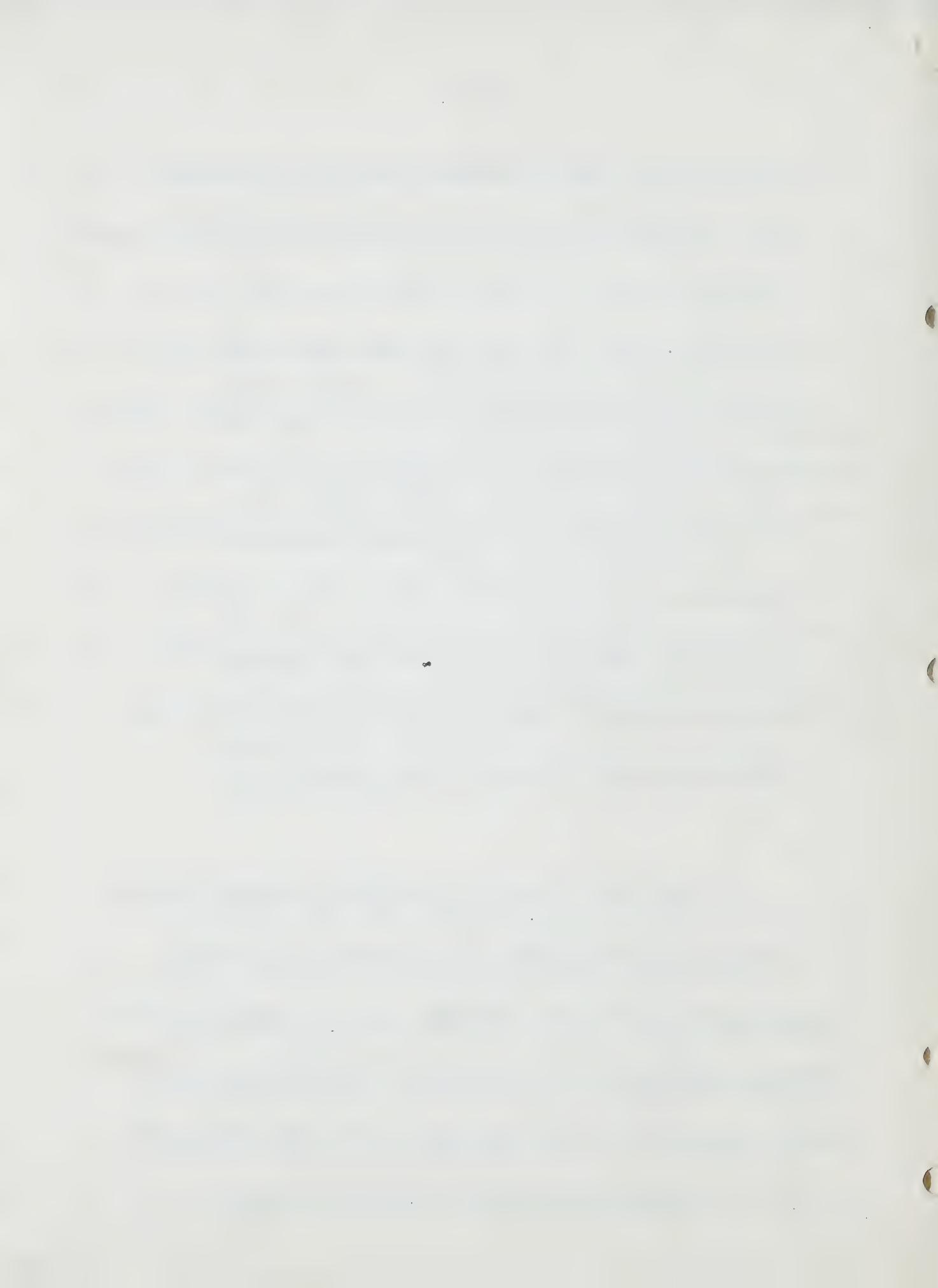
general law or the Human Rights Code of the province or of the federal government on one of two basis:

- (a) That since mandatory retirement will be unlawful in most Canadian jurisdictions, if that is the case, the private sector employees of a particular province are unequally protected and disbenefited in comparison to all public sector employees, contrary to the equality provisions of Section 15 of the Charter; or,
- (b) The more likely scenario, that comparing public and private sector employees in a particular province, one group, the private sector employees, are unequally unprotected or disbenefited contrary to Section 15 of the Charter.

6. And lastly, as I have indicated, it is clear that both the federal and provincial governments may utilize the notwithstanding power of Section 33 to impose mandatory retirement directly or through the establishment of an upper maximum to the definition of age. If they do so, the Charter is rendered impotent on this point.

Unfortunately, the notion that political consequences would deter the use of Section 33 seems now to have been a fantasy, although, frankly, I doubt it will be employed on this particular issue. On the other hand, as I indicated earlier, Section 33 can be a powerful tool for human rights advocates and the courts if they are so disposed, in that it allows the widest scope to be given by the courts to the Section 15 guarantees, on the theory that such action, if found to be politically unacceptable or unwise, on grounds of efficiency, safety or whatever, can be reversed by relatively simple legislative action rectifying the problem.

On the whole, therefore, one might predict, although by no means confidently that, as is presently the case in Manitoba and New Brunswick, and soon, if not already in Quebec, mandatory retirement at any age, in all of Canada, and without regret on my part, will be considered, less than three years hence, to be simply another social and legal memory.



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1982 CASHRA ANNUAL CONFERENCE

CONFERENCE ANNUELLE 1982 DE L'ACOSPDH

Montebello
Quebec / Québec

May 31 - June 2, 1982

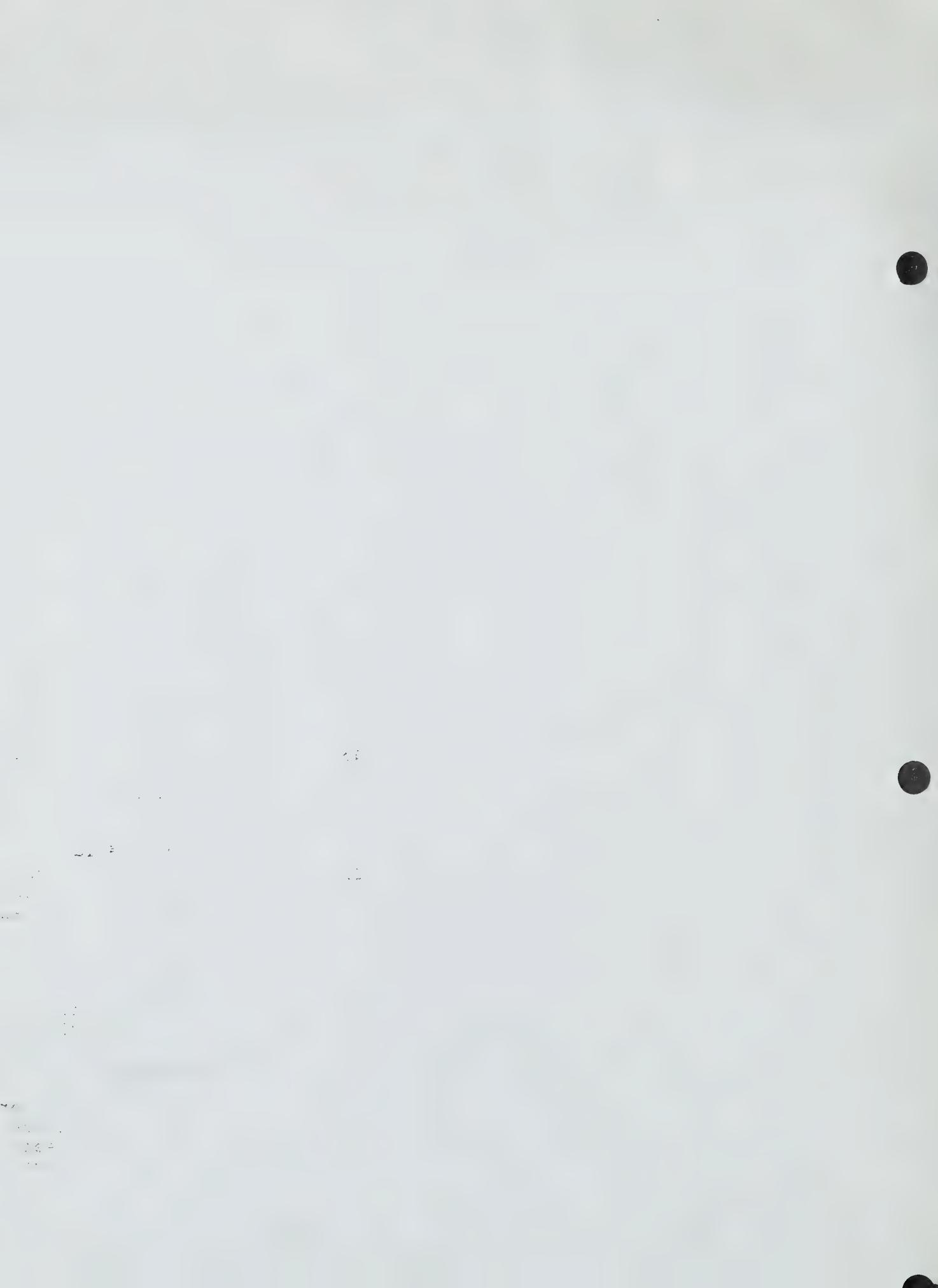
du 31 mai au 2 juin 1982

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DOCUMENT NO. Nº DU DOCUMENT	SOURCE ORIGINE	TITLE TITRE
840-224/001		Agenda of the Conference Ordre du jour de la conférence
840-224/003	Secretariat Secrétariat	Final List of Delegates and Observers Liste définitive des délégués et observateurs
840-224/004		Biographical Notes Notes biographiques
840-224/005	Federal Fédéral	(1) The Charter of Rights and Freedoms - A Guide for Canadians La Charte des droits et libertés - Guide à l'intention des Canadiens
840-224/006	Walter S. Tarnopolsky	The New Charter of Rights and Freedoms - Extract from an overview paper by Walter S. Tarnopolsky, Professor of Law, University of Ottawa, and Director of Human Rights Research and Education Centre
840-224/007	Saskatchewan	The Charter of Rights: Its Impact on Human Rights Commissions by James MacPherson, Coordinator of Constitutional Law, Department of the Attorney General, Government of Saskatchewan
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840-224/009	Saskatchewan Human Rights Commission	Notes for Remarks by Ken Norman, Chief Commissioner, Saskatchewan Human Rights Commission
	Commission des droits de la personne de la Saskatchewan	Notes en vue d'une allocution de M. Ken Norman, Commissaire principal de la Commission des droits de la personne de la Saskatchewan
840-224/010	Karl A. Friedmann	Some Comments on the Independence of Human Rights Officials by Karl A. Friedmann, Ombudsman, British Columbia
840-224/011	Federal	Notes for an Address by the Honourable Jean Chrétien, Minister of Justice and Attorney General of Canada
	Fédéral	Notes pour un discours de l'honorable Jean Chrétien, ministre de la Justice et Procureur général du Canada
840-224/012	Canadian Human Rights Commission	Extract from Notes for Address to the Second International Ombudsmen's Conference, October 27-31, 1980, Jerusalem, by Inger Hansen, Q.C., Privacy Commissioner
	Commission canadienne des droits de la personne	Extrait de notes pour un discours à la deuxième conférence internationale des protecteurs du citoyen du 27 au 31 octobre 1980 - Jérusalem, par Inger Hansen, c.r., Commissaire à la protection de la vie privée
840-224/013	Canadian Human Rights Commission	Notes for Panel Discussion (Data Processing Institute, Professional Development '82, March 18, 1982, Ottawa) by Inger Hansen, Q.C. Privacy Commissioner
	Commission canadienne des droits de la personne	Notes en vue d'un débat (Institut de l'information, perfectionnement professionnel 1982, le 18 mars 1982 - Ottawa) par Inger Hansen, c.r., Commissaire à la protection de la vie privée

DOCUMENT NO. Nº DU DOCUMENT	SOURCE ORIGINE	TITLE TITRE
840-224/014	Special Joint Committee of The Senate and of the House of Commons Comité mixte spécial du Sénat et de la Chambre des communes	Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (Extract), Friday, November 21, 1980 Procès-verbal et témoignages du Comité mixte spécial du Sénat et de la Chambre des communes sur la Constitution du Canada (Extrait), le vendredi 21 novembre 1980
840-224/015	House of Commons Chambre des communes	<u>OBSTACLES</u> - Report of the Special Committee on the Disabled and the Handicapped (Extract), February 1981, House of Commons <u>OBSTACLES</u> - Rapport du Comité Spécial concernant les invalides et les handicapés (Extrait), février 1981, Chambre des communes
840-224/016	Walter Tarnopolsky	Extract from <u>Discrimination and the Law in Canada</u> by Walter Surma Tarnopolsky
840-224/017	Manitoba	Report of the Commission on Compulsory Retirement (Extract) - Marshall E. Rothstein, Q.C., Commissioner, February 1982
840-224/018	Assemblée nationale du Québec	Projet de loi n° 15 - Loi sur l'abolition de la retraite obligatoire et modifiant certaines dispositions législatives - Assemblée nationale du Québec, sanctionné le 1 ^{er} avril 1982
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840-224/020	Saskatchewan Human Rights Commission	Affirmative Action - An Explanation of its Evolution (Part I); The Objectives of Special Programs (Part II); Canada's Record in the 70's (Part III) by Shelagh Day, Assistant Director, Saskatchewan Human Rights Commission
840-224/021	U.S. Equal Employment Opportunity Commission	Extract from <u>Eliminating Discrimination in Employment -- A Compelling National Priority</u> (The U.S. Equal Employment Opportunity Commission, July 1979)
840-224/022	Jack R. London	Notes of Address by Jack R. London, Dean of Law, University of Manitoba

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FEDERAL-PROVINCIAL CONFERENCE OF MINISTERS AND
DEPUTY MINISTERS OF AGRICULTURE

Notes for an Address by the Honourable John Wise
From the Office of the Minister of Agriculture

Federal

Victoria, British Columbia
August 26-27, 1986

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from the office of the Minister of Agriculture the Hon. John Wise

"Though we sometimes have philosophical differences on how best to proceed, and though there are regional differences in the character of our agriculture industry, we have proven in the past that we can work together." (Page 6)

NOTES FOR AN ADDRESS BY THE HONOURABLE JOHN WISE AT THE OPENING OF THE FEDERAL-PROVINCIAL AGRICULTURE MINISTERS' MEETING, VICTORIA, B.C., AUGUST 26, 1986

Page 2 There has been good federal-provincial-industry cooperation in many areas, but there is still need for an even more concerted cooperative effort to meet today's challenges in agriculture.

Page 3 Canada cannot compete with the treasuries of the U.S. and E.E.C in an agricultural trade war, yet the problems it is causing Canada's grain farmers cannot be ignored.

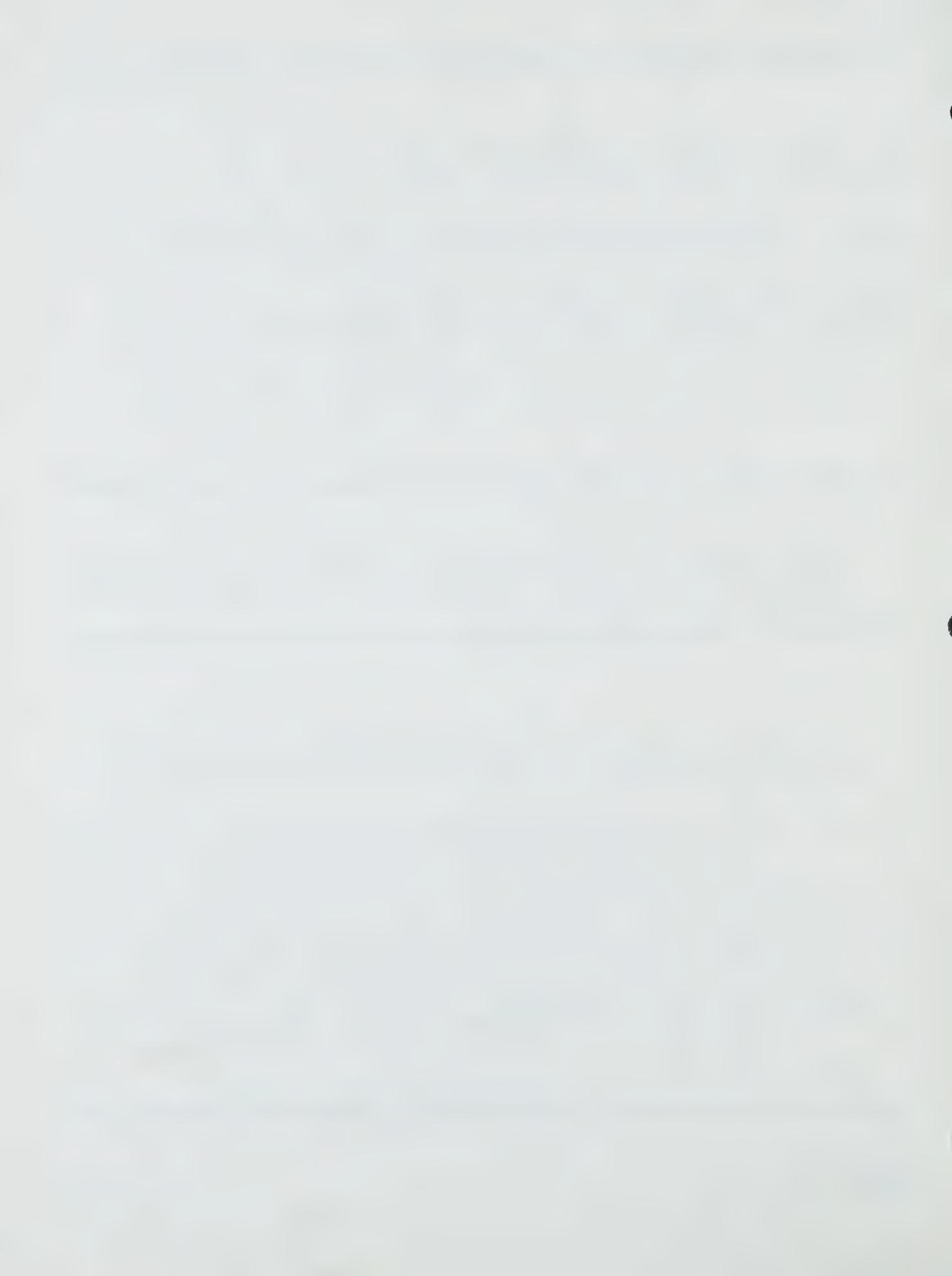
Page 6 In today's tight fiscal environment, federal and provincial governments cannot afford to work at cross purposes or to duplicate one another's efforts.

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Agriculture
Canada

Canada



It is always a pleasure to meet with my provincial counterparts to discuss mutual concerns and activities. I welcome this opportunity to exchange information, to discuss our respective points of view, and to enhance co-operation between our governments on agricultural policies and programs.

Over the next two days, we will be grappling with the major concerns and problems facing Canadian agriculture. It would be naive to suppose that we will find instant solutions to these problems, many of which have their roots beyond our borders. Personally, I will be satisfied if we can agree on collective actions in a few key areas such as emergency disaster relief and soil and water conservation; if we can establish the groundwork for a national agriculture policy; and if we can leave Victoria with a renewed dedication to better coordination of federal and provincial agricultural efforts.

A good part of our agenda is devoted to the follow-up from last November's First Ministers' Conference. We will be reporting to the Prime Minister and the provincial Premiers later this fall on the progress we have made.

Like most Canadians involved with the agri-food industry, I was pleased that agricultural concerns featured prominently when our nation's leaders met last November. But this attention is a bit of a double-edged sword. On the one hand, it reflects the recognition among our leaders that agriculture is a \$20-billion-dollar industry, a major source of employment, a dependable contributor to our balance of trade and an important economic force in all regions of the country.

The biggest factor since last fall, though, has been the worsening of the world grain market situation. Continuing export subsidies in the E.E.C., the U.S. Farm Bill, and the recent U.S. decision to subsidize grain sales to the U.S.S.R. -- these factors have pushed world grain and oilseed prices even lower than had been foreseen a few months ago.

The Canadian Government continues to make every effort to restore sanity and fair trading rules to the world grain market. The short-term price outlook, however, remains bleak. Although we cannot afford to compete with the treasuries of the United States and Europe in this trade war, we will not ignore the problems it is causing our grain producers. The federal government is closely monitoring the situation and considering options to assist Canadian growers.

Falling grain prices have also compounded farm debt problems. In the past two years, the federal government has introduced a number of measures to ease farm financial pressures. These have included improvements to grain and red meat stabilization programs, interest rate reductions for thousands of Farm Credit Corporation clients, and the introduction of shared-risk mortgages and low-interest loans tied to commodity price fluctuations for FCC clients who have low equity levels.

Most recently, we have set up Farm Debt Review Boards in every province to help bring about reasonable settlements between financially pressed farmers and their creditors. These boards are empowered to review the situation of farmers facing insolvency and to stay proceedings by creditors while this

Again, I want to thank my provincial colleagues for the contributions and suggestions they have made with respect to this program.

Despite the immediate difficulties, Canadian agriculture remains a strong and resilient industry. And governments have an important role to play in the longer-term growth and stability of the industry. Which brings me back to some of the other major policy issues we are considering at this meeting -- like our long-range plans for enhancing research and transferring appropriate technologies to our farmers -- like heightening public awareness of our resource base and the critical need to preserve and improve soil and water quality -- like the importance of negotiating a good deal for Canada's food producers in the bilateral and multilateral trade talks.

In all of these areas, federal-provincial cooperation is not just desirable -- it's essential. Though we sometimes have philosophical differences on how best to proceed, and though there are regional differences in the character of our agriculture industry, we have proven in the past that we can work together.

In today's tight fiscal environment we cannot afford to work at cross purposes or to duplicate one another's efforts. In today's competitive world trading environment we cannot afford to quarrel among ourselves. I am confident that we have, around this table in Victoria, the desire to find the common ground and the will to work together in the best interests of Canada's food and agriculture industry.

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DOCUMENT: 830-224/037

CONFERENCE FEDERALE-PROVINCIALE DES MINISTRES
ET DES SOUS-MINISTRES DE L'AGRICULTURE

Projet d'allocution de l'honorable John Wise

Du bureau du ministre de l'Agriculture

Federal

Victoria (Colombie-Britannique)
les 26 et 27 août 1986

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du bureau du ministre de l'Agriculture l'hon. John Wise

"Bien que nos points de vue quant à la meilleure façon d'agir diffèrent parfois et que les caractéristiques du secteur agricole varient selon les régions, nous avons montré, dans le passé, que nous pouvions travailler ensemble." (Page 7)

PROJET D'ALLOCUTION À PRONONCER À L'OCCASION DE L'OUVERTURE DE LA CONFÉRENCE FÉDÉRALE-PROVINCIALE DES MINISTRES DE L'AGRICULTURE, À VICTORIA (C.-B.) LE 26 AOÛT 1986

page 3 "S'il est vrai que le Fédéral, les gouvernements provinciaux et le secteur ont collaboré dans bien des domaines, une concertation accrue est plus que jamais nécessaire si nous voulons relever les défis de l'agriculture."

page 4 "Le Canada ne peut rivaliser financièrement avec les États-Unis et l'Europe dans une guerre commerciale, mais il n'entend pas ignorer les problèmes que celle-ci cause à nos céréaliculteurs."

page 7 "En ces jours de contraintes budgétaires, les gouvernements fédéral et provinciaux ne peuvent se permettre de poursuivre des buts contraires ni de dédoubler leurs efforts."

PRIÈRE DE VÉRIFIER AU MOMENT DE L'ALLOCUTION



Agriculture
Canada

Canada



J'ai toujours grand plaisir à rencontrer mes homologues provinciaux pour discuter de nos préoccupations et de nos activités communes. J'entends d'ailleurs profiter de cette occasion pour échanger des informations, discuter de nos points de vue respectifs et favoriser la collaboration entre nos gouvernements en ce qui concerne les politiques et les programmes agricoles.

À cours des deux prochaines journées, nous nous pencherons sur les principaux problèmes auxquels l'agriculture canadienne doit faire face. Bien entendu, il serait utopique de croire que nous trouverons une solution immédiate à tous ces problèmes qui, pour une bonne part, nous arrivent de l'étranger. Personnellement, je serai satisfait si nous parvenons à nous entendre sur les mesures qu'il convient de prendre collectivement dans quelques domaines clés comme l'aide d'urgence aux victimes de calamités naturelles et la conservation des ressources en sol et en eau, et si nous arrivons à établir le fondement d'une politique agricole nationale et à nous engager de nouveau à mieux coordonner les efforts fédéraux et provinciaux en agriculture.

Une bonne partie de notre programme est consacrée au suivi de la conférence que les premiers ministres ont tenue en novembre dernier. Plus tard cet automne, nous rendrons compte des progrès que nous avons réalisés au Premier ministre du Canada et à ceux des provinces.

comme la recherche, la stabilisation des prix et l'assurance-récolte, nos dirigeants ont souligné la nécessité de mieux concerter et de mieux coordonner nos efforts pour s'adapter à l'évolution constante de l'agriculture.

La situation du secteur agricole a évolué au cours des neuf derniers mois et certains développements ont été positifs. La tendance à la modération des taux d'intérêt s'est maintenue et les coûts de quelques facteurs de production agricole, notamment le carburant, ont diminué. En outre, les prix du boeuf et du porc se sont inscrits en hausse.

Toutefois, les conditions atmosphériques ont causé de graves problèmes à bon nombre de producteurs cette année. La production de cerises a chuté radicalement en Colombie-Britannique. La grêle a dévasté les vergers de pêchers d'une bonne partie de la région de Niagara. Les rendements du blé d'hiver ont diminué sensiblement et un pourcentage élevé de la récolte affiche une qualité inférieure à la normale en Ontario. Enfin, les sauterelles et la grêle ont causé à nouveau des dégâts dans certaines régions des Prairies. Ce ne sont là que quelques exemples parmi tant d'autres.

Depuis l'automne dernier, toutefois, l'aggravation de la situation du marché mondial des céréales est le problème qui a le plus porté à conséquence. Le maintien des subventions à l'exportation de la CEE, la Loi américaine sur la révision des programmes de l'agriculture (U.S. Farm Bill) et la décision récente des États-Unis de subventionner ses ventes de céréales

d'en arriver à des accords raisonnables entre les cultivateurs aux prises avec des difficultés financières et leurs créanciers. Ces bureaux ont le pouvoir d'étudier la situation des agriculteurs menacés de saisie et d'arrêter les poursuites judiciaires entreprises par leurs créanciers pendant la révision de leurs dettes. Les autres agriculteurs peuvent aussi s'adresser aux bureaux pour faire étudier leur situation financière et rechercher de nouveaux accords financiers avec leurs créditeurs.

Je ne prétends pas que ces bureaux régleront tous les cas qui leur seront présentés, mais je pense que leur existence constitue un pas dans la bonne direction. Et, comme je l'ai dit précédemment, si ce système facultatif ne donne pas de bons résultats dans la majorité des cas où l'agriculteur a de bonnes chances de se remettre sur pied, le gouvernement fédéral devra alors songer à prendre d'autres mesures.

Je tiens à remercier mes collègues provinciaux pour les conseils qu'ils nous ont prodigués et les suggestions qu'ils nous ont faites à propos de la Loi sur l'examen de l'endettement agricole. Je veux également souligner que de nombreuses provinces ont promulgué ces derniers mois une législation dans le cadre de leurs compétences visant à aider les producteurs en difficulté.

Malgré toutes les mesures prises jusqu'ici, les difficultés financières agricoles persistent. Mais nous devons faire face à la réalité : certains agriculteurs ont déjà franchi le cap au delà duquel l'aide du gouvernement ne peut plus rien changer à leur situation.

Dans tous ces domaines, la coopération fédérale-provinciale n'est pas seulement souhaitable, elle est essentielle. Bien que nos points de vue quant à la meilleure façon d'agir diffèrent parfois et que les caractéristiques du secteur agricole varient selon les régions, nous avons montré, dans le passé, que nous pouvions travailler ensemble.

En ces jours de contraintes budgétaires, nous ne pouvons nous permettre de poursuivre des buts contraires ni de dédoubler nos efforts. Face à un commerce international extrêmement concurrentiel, nous ne pouvons nous permettre de nous perdre en querelles. Je suis certain qu'ici à Victoria, autour de cette table, nous avons le désir de trouver un terrain d'entente et la volonté de travailler ensemble dans le meilleur intérêt du secteur agro-alimentaire canadien.

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DOCUMENT: 830-224/039

FEDERAL-PROVINCIAL CONFERENCE OF MINISTERS AND
DEPUTY MINISTERS OF AGRICULTURE

The U.S. Farm Bill, U.S. Trade Policy, and World Grain Markets

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National Center for Food and Agricultural Policy

Resources for the Future

Washington, D.C.



British Columbia

Victoria, British Columbia
August 26-27, 1986

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THE U.S. FARM BILL, U.S. TRADE POLICY, AND WORLD GRAIN MARKETS*

Kenneth R. Farrell, Director

National Center for Food and Agricultural Policy

Resources for the Future

Washington, D.C.

World trade and agricultural policies are in disarray. World grain prices are falling across a broad front as a result of huge, still-growing stocks, aggressive U.S. agricultural policies, and low-growth world economic activity. A bitter struggle for market share in slowly expanding global grain markets is underway. In the meantime, budget costs for agricultural support systems are soaring. Protectionist trade policy proposals are being readied in the United States and elsewhere. On the very eve of initiation of a new round of multilateral trade negotiations, agricultural export subsidies and counter subsidies threaten a full-scale trade war.

The seeds of the current agricultural and trade policy crises were planted years ago--massive expansion of the world's agricultural productive capacity in the 1970s, unstable macroeconomic policies, global recession in the 1980s, and unwise agricultural policies which tended to isolate agriculture in several countries from global economic changes. You are by now thoroughly attuned to economists' litany of what went wrong in hindsight. You also are painfully familiar with the bitter fruits that

*Remarks at Conference of Federal and Provincial Ministers of Agriculture, Victoria, British Columbia. August 26-27, 1986. The viewpoints are solely those of the author, not a statement of policy on behalf of Resources for the Future.

sprung from those seeds--reduced farm income and land prices, credit and financial distress in rural communities, and escalating costs of farm programs, to mention just a few.

I will not try to dazzle you with an exhibition of my 20/20 vision of all that has gone wrong in agriculture and trade. Instead I plan to explore with you the possible courses of the murky near-term (two to three years) future for agriculture and agricultural trade, with major emphasis on cereals. Here my vision is much inferior but hopefully not astigmatic!

I will emphasize in particular the role of U.S. policies, agricultural and trade, in shaping the course of future events in world grain markets. Partially, that is because of my familiarity and involvement with those policies. But it is also true that what happens in Washington in the next year or two may be the most important, controllable events in world grain markets.

I begin with discussion and speculation about the future of the U.S. Food Security Act of 1985. There can be little doubt that the FSA and its administration are the single, most-dominant forces of change in world grain markets in 1986 and possibly in 1987-88. But will it survive the mounting economic and political pressures in the United States and abroad? I turn then to discussion of U.S. trade policy issues, with emphasis on agriculture, including thoughts on the U.S.-Canadian discussions on bilateral liberalization of trade and the upcoming GATT negotiations.

I. The Food Security Act of 1985

The Food Security Act is exceedingly complex legislation with important, pervasive implications in North American and world markets. Although the new bill is in many respects a continuation of U.S. farm

policies of the past 10 years, it contains important new provisions designed to increase U.S. agricultural exports and to link U.S. agriculture more closely to conditions in world agricultural markets. It also is likely to be the costliest farm bill in U.S. history. It is almost certain to undergo continuous adjustment, perhaps a major overhaul, in the years immediately ahead.

It is a controversial bill within the United States. It is controversial in other countries as illustrated by recriminations from Thailand, Argentina, Australia, and the EC and the recent countervailing duty suit filed by the Ontario Corn Producers Association. Depending on how the bill is administered it could well escalate the simmering agricultural trade war and undermine both the bilateral U.S.-Canada trade negotiations and the multilateral GATT negotiations.

Since the early 1930s, when government first began to play a major role in the economic affairs of U.S. agriculture, policy has been evolutionary. Each major bill has been built on legislation which preceded it, modified to reflect changing circumstances. The patchwork of policies emerging from this process has become increasingly complex and antiquated. Agriculture and rural America have become so vastly different in structure and in their relationships to the domestic and world economies that some of the very premises undergirding past policies are in question. In the nearly two years of public discussion preceding the FSA there was widespread agreement among analysts and many agricultural leaders that major reform of policies was needed to bring them into closer accord with realities of agriculture and rural communities of the 1980s. Among those realities is the growing interdependence of agriculture in both domestic and world markets, the need to constrain government outlays for agricultural programs in view of prospective huge budget deficits, and the

highly skewed nature of program benefits in favor of large operators and landowners.

Public policies, however, are shaped not just by economics, sometimes not even significantly by economics, but by politics as well. The debate surrounding the FSA took place during the worst economic crisis to hit U.S. agriculture since the great depression of the 1930s. Agricultural exports were falling dramatically, commodity prices and farm incomes were low, and as many as a third of commercial family farms were experiencing substantial to severe financial stress. Politically, 22 senators--16 with substantial farm-belt constituencies--faced re-election in 1986. As in most farm bills since World War II, immediate economic circumstances in agriculture in combination with political expediency, resulted not in policy reform but marginal, incremental change to past policies.

When the 1981 farm bill was written, the "view of the world" in the Congress was that of endemic inflation and scarcity. The Congress mandated increased price support and income protection measures. In 1985, the "view of the world" was one of prolonged disinflation, large current and prospective surpluses of commodities, and declining competitiveness of U.S. agriculture in world markets. If there was a single, dominant purpose of the FSA, it was to enhance U.S. competitiveness and expand exports. Thus, the Secretary of Agriculture was given sweeping authority to lower price support levels and a variety of other options to enhance exports. But in a classic political compromise, the FSA continues high levels of income protection--a measure that will surely make the bill the most costly in history.

At the risk of redundancy, let me review briefly the essence of commodity provisions using wheat and feedgrains as examples.

The FSA set a basic loan rate of \$3.00 for wheat and \$2.40 for corn in the 1986 crop year. For 1987-1990 crop years the loan will be set at 75-85 percent of the preceding five year moving average market price subject to a maximum adjustment of 5 percent in any one year. This is one of the most important innovations in the FSA; it replaces determination of basic loan rates by Congressional fiat with a rolling average relationship to market prices thus enhancing flexibility and market orientation.

But the F.S.A. in a clear gesture to the importance of exports to U.S. agriculture, authorizes the Secretary to establish annually an effective loan rate as much as 20 percent below the basic rate as he deems necessary to maintain U.S. competitiveness in world markets. The Secretary went the 20 percent limit for 1986 crops of wheat and corn. The effective loan rates will be \$2.40 for wheat and \$1.92 for corn. For the 1987 wheat crop the effective loan rate will be \$2.28 per bushel.

Further, FSA provides the Secretary authority to establish a "marketing loan" which allows loan repayment below loan rates. It also exempts such loan repayments from the \$50,000 payment limitation. To date, marketing loans have been established for only cotton and rice. Despite strong pressure to extend the same plum to wheat and feedgrain producers, the Secretary has announced that there will be no marketing loan for wheat in 1987. Announcements on feedgrain programs come later..

Target prices for wheat and corn are frozen at their levels of 1984 and 1985 (\$4.38 wheat, \$3.03 corn) in both the 1986 and 1987 crop years. thereafter, they will be ratcheted downward at 2-5 percent per year to a minimum of \$4.00 for wheat and \$2.75 for corn in 1990. Deficiency payments will be made on the difference between the effective loan rate or market price and the target price--a huge budget exposure.

In return for these guarantees, participating wheat producers were required to reduce their program acreage by 22.5 percent in 1986. For subsequent years through 1990 the minimum acreage reduction will be 20 percent with a maximum of 27.5 percent in 1987 (already announced) and 30 percent in 1988-1990. For corn, the 1986 acreage reduction is 17.5 percent thereafter ranging between 12.5 and 20 percent.

II. Economic Implications

A few weeks ago we made estimates of the economic effects of the FSA over the next three years, 1986-88. As you can appreciate, it is necessary to make a number of "heroic" assumptions in such an analysis. I would not want to be held precisely to the results of the analysis, but I believe they point in the right direction and general order of magnitude of effects if our key assumptions hold. I will merely summarize the highlights of the analysis.

However, let me set the stage upon which the FSA is likely to be played out. Four sets of variables are particularly important to keep in mind.

First, is the global economic setting. Although there has been significant recovery from the depths of the global recession beginning in 1981, economic growth prospects remain tenuous in many countries including the United States and Canada. Real growth rates in the range of 3-4 percent in the industrialized market economies are possible but by no means a sure thing throughout the next three years. In the developing countries, austerity measures necessary to manage their still burdensome external debt problems are likely to continue to restrain import demand. I expect their growth in import demand for agricultural products to remain sluggish for at

least the next year or two. If these judgments are correct, the global "economic pie" is likely to increase only moderately in the next three years. There will be no strong, rising economic tide to lift our boats!

Second, there will be very large world supplies of basic agricultural commodities in 1986-87 and very possibly throughout the next three years. World wheat production in 1986-87 is forecast at 506 million tons, up 4 million from 1985/86. Stocks of both wheat and coarse grains seem likely to be at or near another record high level at the end of the 1986-87 season.

Third, we assumed that the value of the U.S. dollar in foreign exchange would fall about 12 percent in 1986, another 5 percent in 1987, and more moderately in 1988 on an agricultural trade-weighted basis. If so, the demand for U.S. farm products should be mildly stimulated.

Finally, we assumed that current provisions of the FSA will remain intact over the next three years although for reasons I shall explain shortly there is likely to be strong pressure to amend the bill.

Now, some specific results of our analysis:

- ♦ As we expected, there were high rates of participation in FSA programs in 1986; nearly 191 million base acres were enrolled, including 70 million acres of corn and 77 million acres of wheat base, or about 84 percent of the total base for those commodities. Given the market outlook, similar high rates of participation may be anticipated in 1987 if FSA provisions remain intact.
- ♦ Voluntary land reductions have become an increasingly ineffective means of limiting crop production. Harvested acreage of wheat (all) will be down about 3.8 million acres or 6 percent and production of 2.2 billion bushels will be down about 10 percent in 1986 relative to 1985. Harvested acreage of corn will be off about

8 percent but production is forecast to decline only 6 percent to about 8.4 billion bushels. With net government outlays for major commodities in the order of \$18-23 billion in the current and forthcoming fiscal years, it is clear that buying production adjustment through voluntary land reduction is exceedingly costly. With FSA unchanged there will remain a huge production potential in the United States for both wheat and corn for the life of the bill.

- ♦ Our analysis indicates that U.S. and world prices for wheat and corn are likely to fall in about the same order of magnitude as the decline in effective loan rates--25 to 27 percent for the 1986 crop. At \$2.30 for wheat at the farm level in July, prices are already off nearly 22 percent. On-farm corn prices, which dipped under \$2.00 in July, are off nearly 23 percent.
- ♦ The FSA creates a huge budget exposure in the next three years. Net budget outlays for the five major crops are likely to approximate \$18 billion annually through 1989. Net annual program costs for dairy will be in the range of \$1-2 billion. Total costs of the new program could range from \$60-75 billion over the next 3 years. And, it will almost certainly raise government outlays and/or reduce farm income in the EC, Canada, Australia, and Argentina as they are forced to "meet the ante" in what may be a virtual "zero sum" world trade environment.
- ♦ U.S. farm income is generally well protected for the next three years at the expense of U.S. taxpayers. But the bill offers literally no prospect of farm income improvement from the relatively low levels of recent years for producers of supported crops. Any increase in price would not go to producers until market prices exceed target price levels but would simply result in

reduced deficiency payments from the U.S. Treasury. In the meantime, U.S. farmers will derive major parts of their total returns from deficiency payments--perhaps a third for corn producers, 40 percent for wheat producers, and the excess of 50 percent for cotton and rice producers.

III. Trade Implications of the Food Security Act

With respect to FSA's trade title, a battery of provisions is available. To counter export subsidies or import quotas of other countries, the CCC is authorized to use \$110 million (in dollars or commodities) for targeted export assistance each year. Several specialty crops have already availed themselves of the assistance.

The FSA authorizes two credit programs. The first is a short-term (i.e., one to three years) export credit program; \$5 billion is authorized each fiscal year for this program. There is also an intermediate (i.e., three to ten years) credit guarantee program with \$500 million of funding for 1986 through 1988.

The FSA reauthorizes the so-called export enhancement program and provides for use of \$1.5 billion in CCC-owned commodities during the next three years. Under this program PIK subsidies are given to exporters to encourage sales in selected countries. Thus far, wheat and wheat flour have been the principal beneficiaries. The recent decision to extend such subsidies to sales of wheat to the USSR--equal to about \$13 per ton on as much as 3.85 million metric tons, which is the unfulfilled portion of the long-term U.S./USSR wheat agreement--has created a major furor in competing export nations. But more may be in the offing!

A key question is how U.S. and competitors' exports will be affected by lower U.S. loan rates and the battery of trade provisions in the FSA. We believe that most competitors will choose to follow U.S. prices downward in at least the next 1-3 years tending to match subsidy with subsidy and very likely supporting farm income with their own costly new or enriched income transfers. There will be an intense struggle for market share in a slowly growing total market.

In time, price declines of the magnitude we have projected may slow increases in crop production in other countries and encourage the expansion of livestock production in the United States and abroad. But with sluggish global demand and the large current overhang of stocks, world market price recovery will be slow--at least 2-3 years away barring any major production shortfalls.

Although there are some indications of near-term recovery in U.S. agricultural exports--export commitments for wheat and corn for 1986-87 are up 29 and 13 percent, respectively, from a year ago--the recovery will be slow. U.S. export prices for wheat are still well above those of Argentina and close to levels of Canada and Australia. For the three years 1986-88 as a whole our analysis suggests a 25 percent gain in U.S. export volume (higher for rice and cotton) but only a 6 percent gain in export value.

In summary, the FSA moves U.S. agriculture into an aggressive posture to expand exports and recapture market shares gained in the 1970s and lost in the 1980s. It is designed to force competing suppliers to share the economic and fiscal costs of global adjustments to the current disequilibrium in world agricultural markets. It also may have the effect of forcing a "showdown" between the EC and the U.S. in forthcoming GATT negotiations.

From a U.S. perspective, the new bill is fraught with risks and potentially high taxpayer costs. One of the major risks is that we shall be playing in a near-zero-sum trade game; U.S. exports may not respond sufficiently and sufficiently quickly to appreciably reduce our prospective large supplies. In that event, political disenchantment with the high costs and limited export benefits of the bill could ensue quickly and in turn lead to major revisions in the bill. There already is speculation that the Reagan administration will seek an expansion of authorities and funds for the export enhancement program when the new Congress convenes in January 1987.

Another political "Achilles' heel" of the bill is that it is prone to further concentration of government payments to relatively few large operators and landowners. When the magnitude of those payments becomes apparent publicly, the whole apparatus runs the risk of being viewed as a political albatross by the time the new Congress comes into session in early 1987. Thus the bill will be a major test of both U.S. political and economic will over the next several years.

Other amendments likely to be considered in 1987 will almost certainly include strengthening supply management features of the bill. Larger paid diversions are a possibility, particularly if the Congressional will to reduce budget deficits continues to weaken. In a recent referendum among wheat producers, a little more than half of those casting valid ballots favored mandatory wheat production limits that would result in prices of at least 125 percent of the national average cost of production. However, only 22 percent of those eligible to vote did so. It is doubtful that sufficient political power could be mustered to enact such legislation given the course of policy in recent years. Other amendments likely to be offered will be aimed at targeting payments to farmers most in need of

income assistance--mid-size family-operated farms--by means of more stringent payment limitations or various types of "means-tested" criteria.

Although there will be advocates who will urge scrapping of the FSA, I doubt that the political climate will be any more favorable for major reform in January 1987 than in December 1985 when the FSA was enacted. Changes will occur almost certainly. But they are likely to be marginal not quantum in nature. We will continue, as in the past, to muddle through.

In considering the fate of the FSA, there is one inescapable fundamental to keep in mind. Until there is substantial, sustained improvement in world economic conditions, world agricultural trade, prices, and incomes are unlikely to improve materially. Thus, to a major extent, resolution of current economic problems in agriculture lies outside of agriculture and the realms of traditional agricultural policy. Until sustained economic growth can be reestablished, the FSA might be likened to rearranging the deck chairs on the Titanic while waiting for the rescue ship to arrive!

IV. Trade Negotiations: A Way Out?

Discussions next month at Punta del Este will formally launch a new round of GATT multilateral trade negotiations. The stakes will be enormous. Rationalization of world trade policies is essential to sustained world economic growth. For export-oriented countries such as Canada and, to a lesser but major extent, the United States, expansion of trade is imperative to a continued improvement in economic standards of living. No sector in either country has more at stake than our export-dependent agriculture sectors.

The climate for rationalization of trade policies and trade liberalization, however, is gloomy. The winds of protectionism are blowing strongly in many parts of the world. The optimist, of course, will find room for hope in the fact that trade relations have fallen to such a low ebb that negotiators must and will find means of rationalizing international policies.

The circumstances in the United States are symptomatic of those in other industrial market economies. We are in the midst of a major structural transformation of the American economy from that dominated by the "smokestack" industries to one where services will assume a larger role. The current employment of millions will be on the line before the end of the twentieth century. People do not easily accept the effects of structural adjustment. Nor do their governments. Protectionist sentiments are strong and rising in several parts of the American economy. The same is true for Japan and Western Europe. We continue to espouse policies favoring liberalized trade but take actions that are protectionist despite their guise of voluntary import quotas, health and sanitation standards, and sundry other nontariff barriers. The trade bill enacted by the U.S. House of Representatives is a clear manifestation of the sentiment for protectionism. Some of the same elements can be seen in the recent recommendations of the National Commission on Agricultural Trade and Export Policy. While the Senate has yet to enact a trade bill and the administration insists it will veto any bill resembling that passed by the House, the protectionist pressures are mounting.

Of all the sectors that pose problems in the forthcoming negotiations none are more difficult and intractable than agriculture. Every country in the world intervenes in and protects its domestic agriculture. Many of those national policies are at the root of trade policy issues. Until we

are prepared to admit that obvious fact and begin a process of liberalizing and harmonizing domestic policies, little real progress can be achieved in trade negotiations. To be sure, we can give a little on pasta and gain a little on oranges. But that is much like "fiddling while Rome burns." The major issues are in the grains sector, dairy, sugar, tobacco, and, to a lesser extent, the livestock sector. The difficulty in past negotiations has been in achieving concurrent adjustments in domestic policies linked simultaneously to trade policy adjustments. Some in the U.S. contend that past adjustments in policy have been shouldered almost unilaterally by the United States through supply management. Others, while not disagreeing with that contention, argue that because U.S. policies have been major contributors to disequilibrium in world markets it is not unreasonable that the United States should bear a large share of the adjustment costs. The Food Security Act sends strong signals that future costs of adjustments will not be borne solely by the United States.

What then are the prospects for rationalization of domestic policies in the course of GATT trade negotiations? Very poor indeed, should the strategy of some succeed in setting agriculture apart from the negotiations on industrial products, services, and finance. But if that strategy does not succeed, what then might be achieved and by what means?

My colleague Fred Sanderson has suggested several areas in which agriculturally-related negotiations might proceed.¹

¹ Fred Sanderson, "Agricultural Trade Issues in the Upcoming Round of Trade Negotiations," Statement before Subcommittee on Foreign Agriculture of the Senate Committee on Agriculture (Washington, D.C., National Center for Food and Agricultural Policy, Resources for the Future, August 5, 1986).

- ♦ Export Subsidies: strip away the many qualifications in the definition of a subsidy; attain binding agreements to lower them multilaterally.
- ♦ Market Access: negotiate downward the number and stringency of nontariff barriers that significantly affect market access.
- ♦ Convert Quotas to Tariffs: thereby increase the "transparency" of protectionism and make import restrictions more cost-effective.
- ♦ Improve Procedures for Settling Disputes.
- ♦ Seek Multilateral Reductions in Crop Acreage.
- ♦ Negotiate Quid Pro Quo Commodity Tradeoffs: for example, EC restraints on grain production for increased U.S. dairy import quotas.
- ♦ International Commodity Agreements.
- ♦ Seek Harmonization of Agricultural Policies: for example, equalization of protection levels among products across countries.
- ♦ International Consultation on Domestic Policies: a device commonly employed when all else fails.

None of these adjustments will be readily agreed upon; none are panaceas. However, they are possible starting points and to start is important!

Now, let me turn briefly to U.S.-Canada trade negotiations now in progress. Many of my comments regarding multilateral trade negotiations apply to the bilateral U.S.-Canada negotiations. A compelling economic argument can be made for mutual benefits which might derive in the aggregate from free trade in accord with principles of comparative economic advantage. However, the real world is much more complicated and less platonic. Not all regions or producers would fare equally well on either side of the 49th parallel. Small scale agriculture producers might fare

less well than larger scale producers. The uneven distribution of benefits and costs within and between the two countries is certain to be a matter of concern and dispute. Beyond this type of thorny issue, the substantial differences in the structure of our respective agricultural policies will raise other contentious issues. Certainly any agreement for free trade would need to address such issues and contain a plan for gradual harmonization of such policies. I need only refer to the positions of U.S. hog producers and Canadian corn producers to make my point.

The current negotiations are the third such round in this century. The preceding two discussions never really came to the point of proposing free trade because of overriding political issues on one or both sides of the bargaining table. Still those discussions established a foundation for graduated, more liberalized terms of trade than had existed theretofore. I suspect the 1986-87 discussions may lead to the same conclusion.

DOCUMENT : 830-224/039

Traduction du Secrétariat

CONFÉRENCE FÉDÉRALE-PROVINCIALE DES MINISTRES ET
DES SOUS-MINISTRES DE L'AGRICULTURE

Le projet de loi agricole des États-Unis, la politique
commerciale américaine et le marché des céréales

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Ressources pour l'avenir

Washington (D. C.)

Colombie-Britannique



Victoria (Colombie-Britannique)
Les 26 et 27 août 1986

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LE PROJET DE LOI AGRICOLE DES ÉTATS-UNIS, LA POLITIQUE
COMMERCIALE AMÉRICAINE ET LE MARCHÉ DES CÉRÉALES

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Il règne une grande confusion au chapitre des politiques commerciales et agricoles sur la scène mondiale. D'imposantes réserves en progression constante, des politiques ambitieuses des États-Unis en matière d'agriculture et la lenteur de la croissance économique à l'échelle mondiale ont entraîné une chute généralisée des prix des grains dans le monde entier. Une lutte féroce visant à accaparer la plus large part possible du marché des grains, secteur de croissance lente, est en cours. Pendant ce temps, les coûts de l'aide à l'agriculture montent en flèche. Les États-Unis et d'autres pays préparent des projets de politiques commerciales protectionnistes. À la veille même de l'amorce d'une nouvelle ronde de négociations commerciales multilatérales, les subventions aux exportations agricoles et les mesures de rétorsion font planer le danger d'une guerre commerciale totale.

*Observations à la Conférence des ministres fédéral et provinciaux de l'Agriculture, Victoria (Colombie-Britannique) les 26 et 27 août 1986. Les opinions sont celles de l'auteur et non un énoncé de la politique de Ressources pour l'avenir.

Les semences de la crise agricole et commerciale actuelle furent plantées il y a nombreuses années. Elles ont pris la forme d'un élargissement considérable de la capacité mondiale de production agricole au cours des années 70, de politiques macro-économique instables, d'une récession globale durant les années 80 et de politiques agricoles malavisées qui avaient tendance à mettre l'agriculture de plusieurs pays à l'abri de l'évolution économique générale. Vous connaissez maintenant très bien la litanie d'erreurs que les économistes nous débitent après coup. Péniblement, vous avez goûté aux fuits amers qu'ont donnés ces semences, soit une diminution du revenu agricole, une baisse de la valeur des terres, une perte de crédit et une détresse financière dans les collectivités rurales, une hausse du coût des programmes agricoles et beaucoup d'autres encore.

Je n'essaierai pas de vous épater par ma perspicacité à l'égard de toutes les erreurs que nous avons commises en matière d'agriculture et de commerce. J'ai plutôt l'intention d'examiner avec vous les voies obscures qui peuvent s'ouvrir à court terme (deux à trois ans) sur le plan de l'agriculture et des échanges agricoles, en mettant tout particulièrement l'accent sur les céréales. Ma vision dans ce domaine est réduite, mais je ne souffre heureusement pas d'astigmatisme.

J'insisterai tout particulièrement sur l'incidence des politiques agricoles et commerciales américaines sur le comportement futur des marchés mondiaux des grains. Cette façon de procéder s'explique en partie par ma familiarité avec ces politiques. Il faut toutefois également avouer que les décisions qui seront prises à Washington au cours de la prochaine année ou des deux prochaines années représentent peut-être le facteur contrôlable le plus important dans le secteur des marchés mondiaux des grains.

J'entamerai mon propos par une étude et une théorie sur l'avenir de la U.S. Food Security Act de 1985. Il fait peu de doute que cette loi et sa mise en application constitueront la plus importante force de changement sur le marché mondial des grains en 1986 et peut-être en 1987-1988. Toutefois, résistera-t-elle aux pressions économiques et politiques croissantes qui se font sentir aux États-Unis et à l'étranger? J'aborderai ensuite la question des politiques commerciales américaines, surtout en ce qui a trait à l'agriculture, et je formulerai quelques réflexions concernant les discussions canado-américaines sur le libre-échange ainsi que les prochaines négociations du GATT.

I. La Food Security Act de 1985

Il s'agit d'une loi extrêmement complexe dont les répercussions importantes se feront sentir un peu partout sur les marchés nord-américains et mondiaux. Cette loi s'inscrit, sous de nombreux angles, dans la foulée des politiques agricoles américaines des dix dernières années, mais elle comporte néanmoins de nouvelles dispositions importantes destinées à accroître les exportations agricoles américaines et à établir un lien plus étroit entre l'agriculture américaine et les conditions sur les marchés agricoles mondiaux. Elle deviendra vraisemblablement la loi agricole la plus onéreuse de toute l'histoire des États-Unis. On peut être presque assuré qu'elle fera constamment l'objet de rajustements, voire d'une révision complète au cours des prochaines années.

Elle suscite la controverse à la fois aux États-Unis et dans d'autres pays, comme l'illustrent les doléances formulées par la Thaïlande, l'Argentine, l'Australie et la CEE de même que la récente poursuite pour versement de droits compensateurs intentée par l'Association des producteurs de maïs de l'Ontario. Dépendant de la forme que prendra la mise en application de la loi, cette dernière risque d'entraîner une escalade de la guerre commerciale qui couve dans le secteur agricole et de saper à la fois les négociations commerciales bilatérales canado-américaines et les négociations multilatérales du GATT.

La politique a évolué depuis le début des années 1930 lorsque le gouvernement a commencé à intervenir vraiment sur le plan des conditions économiques de l'agriculture américaine. Chaque loi importante s'est inspirée des lois qui l'avaient précédée; les modifiant en fonction des circonstances nouvelles. La mosaïque de politiques qui en a résulté est de plus en plus complexe et dépassée. L'agriculture et les conditions de l'Amérique rurale sont caractérisées par un si grand nombre de différences sur le plan de l'organisation et des rapports avec les économies nationale et mondiale que certaines des hypothèses sur lesquelles reposaient les politiques antérieures sont remises en question. Au cours des quelque deux années de discussions publiques qui ont précédé l'adoption de la loi, les analystes et bon nombre de chefs de file du secteur agricole en sont généralement venus à la conclusion qu'une réforme majeure des politiques s'imposait pour les rendre conformes à la réalité de l'agriculture et des collectivités rurales des années 80. Un de ces facteurs concrets prend la forme d'une interdépendance croissante des marchés national et mondial de l'agriculture, d'une nécessité de limiter les sorties de fonds gouvernementales au titre des programmes agricoles en raison des imposants déficits budgétaires prévus et du favoritisme considérable que consentent les programmes aux plus gros exploitants et propriétaires terriens.

Toutefois, les politiques publiques ne sont pas dictées uniquement par la conjoncture économique, mais souvent beaucoup plus par des raisons politiques. Le débat qui a entouré la FSA s'est déroulé au moment où l'agriculture américaine subissait sa pire crise économique depuis la grande dépression des années 30. Les exportations agricoles étaient en chute libre, les prix des produits et les revenus agricoles tombaient à leur plus bas et environ un tiers des familles exploitant des fermes commerciales se trouvaient aux prises avec des problèmes financiers variant entre sérieux et très graves. Sur le plan politique, 22 sénateurs, dont 16 représentant des régions où l'agriculture était importante, devaient faire face à une élection en 1986. Comme ce fut le cas pour la plupart des lois agricoles depuis la Seconde Guerre mondiale, la situation immédiate en agriculture combinées à l'opportunisme politique ont entraîné non pas une réforme de la politique, mais des modifications marginales et progressives aux politiques antérieures.

Lorsque la loi agricole fut rédigée en 1981, en jetant un regard sur le monde, le Congrès y voyait une inflation et une pénurie endémiques. Il a donc imposé un soutien accru aux prix et des mesures de protection du revenu. En 1985, il y voyait une déflation prolongée, un excédent actuel et futur de denrées et une diminution de la capacité de l'agriculture américaine de soutenir la concurrence sur les marchés mondiaux. Si l'on devait cerner un objectif dominant de la loi, on pourrait dire qu'il consistait à améliorer la capacité de concurrence des États-Unis et à élargir le marché des exportations. Pour cette raison, le Secrétaire de l'Agriculture obtenait de vastes pouvoirs pour réduire le soutien aux prix et prendre diverses autres dispositions favorisant un accroissement des exportations. Toutefois, dans l'optique des compromis politiques traditionnels, la loi continue d'offrir une protection du revenu considérable, ce qui en fera sûrement la plus coûteuse de toute l'histoire.

Au risque de me répéter, permettez-moi de résumer les principales dispositions touchant les produits, en prenant comme exemple le blé et les provendes.

La loi a fixé le taux de base des prêts à 3 \$ pour le blé et 2,40 \$ pour le maïs au cours de l'année-récolte 1986. Pour les années-récoltes de 1987 à 1990, le prêt atteindra quelque 75 à 85 p. 100 du prix moyen continu sur le marché durant les cinq années précédentes avec réajustement maximal de 5 p. 100 par année. Il s'agit d'un des principaux nouveaux éléments de la loi. On se trouve à remplacer l'établissement du prêt de base en vertu d'une autorisation du Congrès par une formule de moyenne continue en rapport avec le prix commercial, ce qui accroît la souplesse et l'orientation vers le marché.

Dans un geste traduisant manifestement l'importance des exportations pour l'agriculture américaine, la loi autorise le Secrétaire à fixer à chaque année le taux réel de prêts à un niveau pouvant être inférieur de quelque 20 p. 100 au taux de base s'il le juge nécessaire pour maintenir la compétitivité des États-Unis sur les marchés mondiaux. Le Secrétaire a atteint la limite de 20 p. 100 à l'égard des récoltes de blé et de maïs de 1986 pour lesquelles les taux des prêts s'établiront respectivement à 2,40 \$ et 1,92 \$. Au cours de l'année-récolte de blé de 1987, le taux de prêt réel se situera à 2,28 \$ par boisseau.

La loi autorise en outre le Secrétaire à accorder un "prêt de mise en marché" dont le remboursement peut s'effectuer à des taux inférieurs à ceux qui sont prévus. Ceux qui obtiennent de telles conditions de remboursement de prêts sont également exemptés de la limite de 50 000 \$. Jusqu'à présent, seuls les secteurs du coton et du riz ont bénéficié de prêts de

commercialisation. Même si les pressions se sont faites fortes pour que la manne soit également déversée sur les producteurs de blé et de provendes, le Secrétaire a annoncé qu'il n'y aurait aucun prêt de mise en marché dans le secteur du blé en 1987. Les annonces concernant les céréales fourragères viendront plus tard.

Les prix cibles du blé et du maïs sont gelés à leur niveau de 1984-1985 (4,38 \$ pour le blé et 3,03 \$ pour le maïs) pour les années-récoltes 1986 et 1987. Par la suite, ils seront réduits progressivement de 2 à 5 p. 100 par année jusqu'à ce qu'ils atteignent un minimum de 4 \$ pour le blé et de 2,75 \$ pour le maïs en 1990. Des paiements d'appoint couvriront la différence entre le taux de prêt réel ou le prix du marché et le prix cible. Il s'agit d'un engagement budgétaire énorme.

En échange de ces garanties, les producteurs de blé participants doivent réduire la superficie ensemencée de 22 p. 100 en 1986. Au cours des années subséquentes et jusqu'en 1990, la superficie devra être réduite d'au moins 20 p. 100. Le maximum est fixé à 27,5 p. 100 en 1987 (déjà annoncé) et à 30 p. 100 de 1988 à 1990. La superficie ensemencée de maïs devra être réduite de 17,5 p. 100 en 1986 et cette réduction variera entre 12,5 p. 100 et 20 p. 100 par la suite.

II. Les indicences économiques

Il y a quelques semaines, nous avons fait des prévisions concernant les répercussions de la loi au cours des trois prochaines années, soit de 1986 à 1988. Comme vous le savez, une telle analyse repose nécessairement sur certaines hypothèses "audacieuses". Je ne dis pas qu'on doit s'en tenir uniquement aux résultats de l'analyse, mais j'estime que ces derniers vont

dans le bon sens et qu'ils donnent une idée générale exacte de l'ampleur des conséquences, en supposant évidemment que nos hypothèses de départ se confirment. Je me contenterai de résumer les principaux points de l'analyse.

Toutefois vous me permettrez d'abord de définir les conditions dans lesquelles la loi sera vraisemblablement mise en application. Il est important de tenir compte de quatre séries de variables.

Premièrement, la conjoncture économique globale. Même si l'on s'est assez bien sorti du gouffre de la récession générale qui a débuté en 1981, les perspectives de croissance économique demeurent fragiles dans de nombreux pays, y compris aux États-Unis et au Canada. Il est possible, mais loin d'être certain, que les économies des pays industrialisés connaîtront des taux de croissance réels variant entre 3 et 4 p. 100 au cours des trois prochaines années. Les mesures d'austérité rendues nécessaires dans les pays en voie de développement afin de contrôler le fardeau d'une dette extérieure qui demeure excessive continueront probablement de freiner leurs importations. Je m'attends à ce que leurs importations de produits agricoles stagnent pendant encore au moins un an ou deux. Si mon évaluation est exacte, il est fort possible que la situation économique globale ne s'améliore que légèrement au cours des trois prochaines années. Aucun vent puissant et durable ne viendra gonfler notre voile!

Deuxièmement, la réserve de denrées agricoles de base restera énorme en 1986-1987 et très probablement au cours des trois prochaines années. On prévoit que la production mondiale de blé pour l'année en question s'élèvera à 506 millions de tonnes, soit 4 millions de plus qu'en 1985-1986. Les réserves de blé et de céréales secondaires atteindront vraisemblablement un niveau record ou s'en approcheront à la fin de la saison 1986-1987.

Troisièmement, nous nous attendons à ce que la valeur du dollar américain par rapport aux devises étrangères tombe de quelque 12 p. 100 en 1986, d'un autre 5 p. 100 en 1987 et dans une mesure moindre en 1988, compte tenu des échanges agricoles internationaux. S'il en était ici, la demande de produits agricoles américains serait légèrement stimulée.

Finalement, nous avons présumé que la loi demeurera telle quelle durant les trois prochaines années même si, pour les raisons que j'expliquerai bientôt, les pressions en vue de sa modification risquent d'être fortes.

Notre analyse permet notamment de dégager les conclusions précises suivantes :

- ° Comme nous nous y attendions, le taux de participation aux programmes prévus par la loi fut élevé en 1986. Près de 91 millions d'acres ensemencées furent inscrites, ce qui comprenait 70 millions d'acres de maïs et 77 millions d'acres de blé. Ces totaux représentent environ 84 p. 100 de la superficie totale ensemencée de ces deux types de grains. En raison de l'état du marché, des taux de participation aussi élevés sont à prévoir pour 1987 si les dispositions de la loi restent intactes.
- ° Les réductions volontaires de la superficie ensemencée deviennent un moyen de plus en plus inefficace de contrôler l'ampleur des récoltes. La superficie (totale) sur laquelle du blé sera récolté aura diminuée de 3,8 millions d'acres, soit de 6 p. 100, et la production de 2,2 milliards de boisseaux représentera une baisse d'environ 10 p. 100 en 1986 par rapport en 1985. La superficie sur

laquelle le maïs est récolté sera réduite de quelque 8 p. 100, mais on prévoit que la production ne tombera que de 6 p. 100, soit à quelque 8,4 milliards de boisseaux. Or, les sorties nettes de fonds du gouvernement au titre des principales denrées devant varier entre 18 et 23 milliards de dollars pendant l'année financière en cours et les années subséquentes, il est évident que la méthode d'incitation au contrôle de la production au moyen d'une diminution volontaire des superficies ensemencées est extrêmement onéreuse. Si la loi n'est pas touchée, la capacité de production de blé et de maïs aux États-Unis, au cours de la période pendant laquelle la loi en question sera en vigueur, demeure énorme.

- ° Notre analyse révèle que les prix américains du blé et du maïs devraient baisser dans une proportion comparable à la chute des taux de prêts réels, soit entre 25 et 27 p. 100 en ce qui a trait à la récolte de 1986. À 2,30 \$ pour le blé pris à la ferme en juillet, les prix ont déjà reculé de 22 p. 100. Le prix du maïs à la ferme a plongé sous les 2 \$ en juillet, ce qui représente un recul de près de 23 p. 100.
- ° La loi entraînera une ponction budgétaire considérable au cours des trois prochaines années. Les sorties de fonds nettes au titre des cinq principales récoltes devraient se chiffrer à quelque 18 milliards de dollars par année jusqu'en 1989. Le coût annuel net du programme laitier variera entre 1 et 2 milliards de dollars. Le coût total des nouveaux programmes pourrait s'établir entre 60 et 75 milliards de dollars au cours des trois prochaines années. Ces injections de fonds auront presque inévitablement pour effet d'accroître les sorties de fonds des gouvernements de la CEE, du Canada, de l'Australie et de l'Argentine ou

d'y provoquer une diminution du revenu agricole. Les pays concernés devront en effet surenchérir dans un contexte de commerce mondial "à somme pratiquement nulle".

° Généralement parlant, le revenu agricole américain sera bien protégé au cours des trois prochaines années aux frais du contribuable américain. Toutefois, la loi ne laisse entrevoir que de minces possibilités d'amélioration du revenu des producteurs des cultures subventionnées qui s'est situé à un niveau relativement bas au cours des dernières années. Les producteurs ne profiteraient pas d'une hausse des prix tant que les prix du marché n'excéderaient pas les niveaux cibles. Cette hausse des prix aurait donc pour seul résultat d'entraîner une réduction des paiements d'appoint du Trésor américain. Entre temps, les agriculteurs américains tireront la majeure partie de leur revenu total des paiements d'appoint. La proportion pourrait être d'un tiers dans le cas des producteurs de maïs, de 40 p. 100 dans le cas des producteurs de blé et de plus de 50 p. 100 pour les producteurs de coton et de riz.

III. Les incidences de la Food Security Act sur le commerce

Tout un éventail de dispositions est prévu sous la rubrique des échanges commerciaux de la loi. La CCC est autorisée à injecter à chaque année pour une valeur de 110 millions de dollars (en espèces ou en produits) afin de favoriser l'exportation de produits précis en compensant les subventions aux exportations et les contingents d'importation des autres pays. Plusieurs cultures spécialisées ont déjà eu recours à cette aide.

La loi sanctionne deux programmes de crédit. Le premier est un programme de crédit d'exportation à court terme (durée d'un à trois ans) qui prévoit un versement de 5 milliards de dollars au cours de chaque année financière. Il existe en outre un programme intermédiaire de garantie de crédit (durée de trois à dix ans) pour lequel une somme de 500 millions de dollars est prévue de 1986 à 1988.

La loi a rétabli le programme d'élargissement des exportations et prévoit l'écoulement de produits de la CCC d'une valeur de 1,5 milliard de dollars au cours des trois prochaines années. En vertu de ce programme, des subventions PIK sont versées à des exportateurs afin de favoriser les ventes dans certains pays. Jusqu'à présent, le blé et la farine de blé furent les principaux bénéficiaires. La récente décision d'étendre la subvention aux ventes de blé à l'Union soviétique a suscité un tollé dans les pays exportateurs concurrents. La subvention équivaut à 13 \$ la tonne sur une quantité maximale de 3,85 millions de tonnes métriques, soit la portion non encore exécutée du contrat de vente de blé à long terme des États-Unis à l'Union soviétique. Toutefois, le pire est peut-être à venir!

Un élément fondamental consiste à déterminer l'incidence des taux de prêt américains réduits et de l'éventail de dispositions commerciales contenues dans la loi sur les exportations des États-Unis et des pays concurrents. Nous croyons que la plupart de nos concurrents décideront de suivre l'exemple américain et de baisser les prix pendant un à trois ans en répondant aux subventions par d'autres subventions et en soutenant vraisemblablement le revenu agricole sur leur territoire grâce à leurs propres programmes nouveaux ou améliorés, mais onéreux, de transferts de revenus. La lutte pour accaparer la plus grande part du marché sera intense dans un contexte de marché total en progression lente.

Avec le temps, les chutes de prix prendront l'ampleur que nous avons prévue et elles devraient entraîner une réduction de la production dans d'autres pays et favoriser la production de bétail aux États-Unis et à l'étranger. Toutefois, la stagnation de la demande globale et l'excédent considérable de stocks à l'heure actuelle rendront lente l'amélioration des prix sur le marché mondial et il faudra compter au moins deux à trois ans si aucun autre important facteur néfaste ne vient entraver la production.

La reprise sera lente même si certains indices d'une reprise à court terme des exportations agricoles des États-Unis se manifestent. Par exemple, les promesses d'exportation de blé et de maïs pour 1986-1987 sont déjà supérieures dans des proportions de 29 et 13 p. 100 respectivement ce qu'elles étaient il y a un an. Les prix du blé américain exporté sont largement supérieurs à ceux de l'Argentine et ils se situent plus près de ceux du Canada et de l'Australie. Notre analyse prévoit pour l'ensemble des trois années 1986, 1987 et 1988 un accroissement du volume des exportations américaines de l'ordre de 25 p. 100 (plus élevé pour le riz et le coton) qui ne représentera toutefois qu'un gain de 6 p. 100 sur le plan de la valeur des exportations.

Bref, la loi pousse l'agriculture américaine à faire preuve d'audace pour élargir les marchés et reprendre la part accaparée au cours des années 70 et perdue au cours des années 80. Elle est destinée à obliger les fournisseurs qui font concurrence à assumer une partie des frais économiques et fiscaux des rajustements globaux qu'impose le déséquilibre actuel sur le marché agricole mondial. Elle risque également d'entraîner une "épreuve de force" entre la CEE et les États-Unis dans le cadre des prochaines négociations du GATT.

Dans l'optique américaine, la nouvelle loi comporte des risques et une menace de coûts très élevés pour le contribuable. Un des principaux dangers est lié au fait qu'il s'agit d'un jeu commercial à somme nulle et que la réaction des exportateurs américains risque d'être insuffisante ou trop lente pour entraîner une diminution satisfaisante de nos importantes réserves futures. Si cela devrait se produire, le mécontentement politique suscité par le coût élevé de la loi et par ses avantages restreints sur le plan des exportations pourrait se manifester rapidement et déboucher sur une révision importante de la loi. Certains sont déjà convaincus que l'administration Reagan demandera un accroissement des pouvoirs et des crédits aux fins du programme d'élargissement des exportations lorsque le nouveau Congrès se réunira en janvier 1987.

Le fait que la loi favorise encore plus le versement de subventions gouvernementales à un nombre relativement restreint d'importants exploitants et propriétaires terriens en est un autre point faible sur le plan politique. Lorsque le public connaîtra l'ampleur des versements, on court le risque que toute la démarche ne soit perçue comme une utopie politique au moment où le nouveau Congrès entreprendra sa session au début de 1987. La loi constituera donc une importante mise à l'épreuve de la volonté politique et économique des Etats-Unis pendant plusieurs années.

Il est presque certain que des modifications auxquelles on songera en 1987 porteront sur le resserrement des dispositions de la loi relatives au contrôle de l'offre. Des incitations financières plus considérables à la mise hors culture sont une possibilité si l'on continue d'assister à un affaiblissement de la volonté du Congrès de réduire les déficits budgétaires. Au cours d'un récent référendum auprès des producteurs de blé, un

peu plus de la moitié de ceux dont le vote était valide se sont prononcés en faveur de l'établissement de limites obligatoires à la production de blé qui donneraient des prix au moins équivalents à 125 p. 100 du coût de production national moyen. Toutefois, seulement 22 p. 100 des producteurs admissibles ont voté. Je doute qu'on puisse mobiliser suffisamment de volonté politique pour faire adopter une loi en ce sens, eu égard à l'orientation prise par la politique ces dernières années. D'autres modifications seront vraisemblablement proposées de manière à faire profiter des subventions les agriculteurs qui ont le plus besoin d'un soutien du revenu, soit ceux qui dirigent des exploitations agricoles familiales de taille moyenne en imposant des critères plus rigoureux pour limiter les versements ou divers genres de normes de vérification des moyens.

Il y en aura certainement qui prôneront une mise au rancart pure et simple de la loi, mais je doute que la conjoncture politique soit plus propice à une réforme majeure en janvier 1987 qu'elle ne l'était en décembre 1985 au moment de l'adoption de la loi. Des changements surgiront presque inévitablement, mais ils seront plutôt marginaux que quantifiables. Comme par le passé, nous nous en tirerons tant bien que mal.

Lorsqu'on cherche à évaluer le sort qui attend la loi, il n'y a qu'une seule vérité inéluctable qui tienne à l'échelle mondiale : le commerce, les prix et le revenu agricole ont peu de chance de s'améliorer tant que la situation économique mondiale ne connaîtra pas une reprise considérable et soutenue. Par conséquent, la solution aux problèmes économiques actuels en agriculture se trouve, en grande partie, à l'extérieur de ce secteur et hors de portée des politiques agricoles traditionnelles. Tant qu'on n'assistera pas à une relance économique soutenue, la loi peut être comparée à une remise en ordre des chaises sur le pont du Titanic pendant qu'on attendait les bateaux de secours !

IV. Les négociations commerciales : une issue?

Les discussions qui auront lieu le mois prochain à Punta del Este marqueront le lancement officiel d'une nouvelle ronde de négociations multilatérales du GATT. Les enjeux seront énormes. Une rationalisation des politiques commerciales mondiales est indispensables pour soutenir la croissance économique à l'échelle mondiale. L'essor du commerce est indispensable à l'amélioration du niveau de vie dans les pays tributaires des exportations, comme le Canada, et dans une mesure moindre, mais néanmoins considérable, les États-Unis. Aucun autre secteur dans nos pays respectifs n'est aussi directement concerné que l'agriculture, secteur largement tributaire des exportations.

Toutefois, les perspectives de rationalisation de la politique commerciale et de libre-échange sont plutôt sombres. Le vent du protectionnisme souffle fort dans de nombreuses régions du monde. L'optimiste trouvera évidemment une raison d'espérer dans le fait que les relations commerciales sont dans un si piètre état que les négociateurs seront forcés de trouver des moyens de rationaliser les politiques internationales.

La situation aux États-Unis est un reflet de ce qui se passe dans l'économie de marché d'autres pays industriels. L'économie américaine se trouve en pleine mutation structurale. Elle ne sera plus dominée par des industries de transformation en produits de base et les services auront un rôle plus important. Des millions d'emplois actuels seront menacés avant la fin du XX^e siècle. Les gens et les gouvernements acceptent difficilement les conséquences des modifications structurales. Le protectionnisme est fort et en progression dans plusieurs secteurs de

l'économie américaine. La même constatation vaut pour le Japon et l'Europe occidentale. Nous continuons de prôner des politiques favorisant le libre-échange, mais nous prenons des mesures protectionnistes que nous déguisons en contingents volontaires des importations, en normes de santé et d'hygiène et en barrières non tarifaires et autres. La loi sur le commerce adoptée par la Chambre des représentants des États-Unis traduit manifestement une orientation vers le protectionnisme. On décèle certains éléments analogues dans les recommandations récentes de la National Commission on Agricultural Trade and Export Policy. Le Sénat n'a pas encore adopté la loi sur le commerce et l'administration a affirmé qu'elle opposera son veto à toute loi qui ressemblerait à celle que la Chambre a adoptée, mais les pressions protectionnistes se font de plus en plus fortes.

Au cours des prochaines négociations, aucun autre secteur ne soulèvera des problèmes plus difficiles et plus insolubles que celui de l'agriculture. Chaque pays intervient dans son secteur agricole et veille à le protéger. Bon nombre de politiques nationales sont la cause de difficultés en matière de politiques commerciales. Les négociations commerciales ne progresseront que très lentement tant que nous n'admettrons pas ce fait évident et que nous ne commenceront pas à libéraliser et à harmoniser les politiques nationales. Il va sans dire qu'en cédant un peu sur le plan des pâtes, nous pouvons gagner un peu sur celui des oranges, mais ce n'est que la pointe de l'iceberg. Les principales difficultés surgissent dans les secteurs des grains, des produits laitiers, du sucre, du tabac et, dans une certaine mesure, dans celui du bétail. Lors des négociations antérieures, il a été difficile d'obtenir simultanément des rajustements aux politiques nationales et des rajustements aux politiques commerciales. Aux États-Unis, certains soutiennent que, par le passé, ce pays a été presque le seul à subir les conséquences des rajustements de politiques sous forme d'un contrôle de l'offre.

D'autres, sans contester cette affirmation, estiment qu'il n'est pas injuste que les États-Unis fassent dans une grande mesure les frais des rajustements parce que les politiques américaines ont largement contribué à déséquilibrer les marchés mondiaux. Or, la Food Security Act transmet le message que les États-Unis ne seront plus les seuls à assumer les frais des rajustements.

Quelles sont donc les chances de rationalisation des politiques nationales dans le cadre des négociations commerciales du GATT? Elles sont en réalité très médiocres, surtout si la stratégie consistant à mettre l'agriculture à l'abri des négociations portant sur les produits industriels, les services et la finance devait réussir. Dans le cas contraire, quels progrès peut-on espérer et de quelle façon?

Mon collègue Fred Sanderson a proposé plusieurs voies dans lesquelles les négociations relatives à l'agriculture pourraient s'engager¹.

- ° Les subventions aux exportations : éliminer les nombreuses conditions que comporte la définition d'une subvention et obtenir des accords rendant obligatoire une réduction multilatérale de ces conditions.

¹Fred Sanderson, "Agricultural Trade Issues in the Upcoming Round of Trade Negotiations", Statement before Subcommittee on Foreign Agriculture of the Senate Committee on Agriculture (Washington, D.C., National Center for Food and Agricultural Policy, Resources for the Future, le 5 août 1986).

- ° L'accès au marché : négocier un recul sur le plan du nombre et de la rigueur des barrières non tarifaires qui entravent grandement l'accès au marché.
- ° Transformer les contingents en tarifs : donner ainsi une plus grande "transparence" au protectionnisme et rendre les restrictions sur les importations plus rentables.
- ° Améliorer les modalités de règlement de différends.
- ° Chercher à obtenir une diminution multilatérale de la superficie de culture.
- ° Négocier des concessions équivalentes à l'égard de denrées différentes : par exemple, des restrictions de la CEE sur la production de grains en échange d'un contingentement accru des importations de produits laitiers américains.
- ° Des accords internationaux touchant les denrées.
- ° Chercher à obtenir une harmonisation des politiques agricoles : par exemple, faire en sorte que le même niveau de protection soit accordé aux produits dans tous les pays.
- ° Une consultation internationale sur les politiques nationales : il s'agit d'un instrument auquel on a habituellement recours lorsque toutes les autres démarches échouent.

Aucune de ces formules ne ralliera facilement les intervenants et aucune ne constitue une panacée. Toutefois, toutes peuvent servir de point de départ, ce qui n'est déjà pas si mal!

Vous me permettrez maintenant d'aborder la question des négociations commerciales canado-américaines en cours. Bon nombre de mes observations concernant les négociations commerciales multilatérales s'appliquent également aux négociations bilatérales canado-américaines. On peut trouver des arguments irréfutables reposant sur les avantages réciproques qui peuvent généralement découler d'un accord de libre-échange conforme au principe d'avantages économiques comparables. Toutefois, la réalité est beaucoup plus complexe et elle s'écarte de la théorie. Toutes les régions et tous les producteurs de nos pays respectifs ne profiteraient pas du libre-échange dans la même mesure. Il est possible que les petits producteurs agricoles se tirent moins bien d'affaire que les gros exploitants. Il est inévitable que la distribution inégale des avantages et des coûts à l'intérieur des deux pays et entre eux suscite des préoccupations et des désaccords. À ce problème épineux s'ajoutera la question délicate des différences considérables sur le plan de l'orientation de nos politiques agricoles respectives. Tout accord de libre-échange devra évidemment régler ces questions et mettre de l'avant un plan d'harmonisation graduelle de nos politiques. Il suffit de songer à la position des producteurs de porcs des États-Unis et à celle des producteurs canadiens de maïs pour illustrer mon point de vue.

Les négociations en cours sont la troisième ronde à avoir lieu au cours du siècle. Les deux premières n'ont vraiment jamais eu la chance de déboucher sur des propositions de libre-échange en raison de considérations politiques prépondérantes qui dictaient la conduite de l'une ou des deux parties à la table de négociations. Ces discussions ont néanmoins jeté les bases d'une plus grande libéralisation graduelle du commerce. Je suis porté à croire que les discussions de 1986-1987 connaîtront un aboutissement analogue.

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DOCUMENT: 830-224/040

FEDERAL-PROVINCIAL CONFERENCE OF MINISTERS AND
DEPUTY MINISTERS OF AGRICULTURE

Communiqué

100-78



Conference

Victoria, British Columbia
August 26-27, 1986

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For Immediate Release

AGRICULTURE MINISTERS MEET IN VICTORIA

VICTORIA, B.C., August 27, 1986 -- Federal and provincial Ministers of Agriculture today ended a two-day meeting here that centred on trade issues, falling farm incomes and a framework for a national agricultural development strategy.

The Ministers acknowledged the severe damage to Canadian farm incomes created by the subsidy wars between the United States and the European Economic Community in international agricultural commodity markets. This trade war is reducing Canadian farm income by billions of dollars.

They supported the need to examine all options, including deficiency payments which could be in excess of one billion dollars, to maintain the competitive position of Canadian producers in the immediate future. There was a clear, collective commitment to take action to support the agricultural sector and all the jobs it represents across Canada during this damaging trade war.

The Ministers agreed to have a specific proposal to deal with this farm income shortfall ready for the First Ministers' trade meeting on September 17th.

While Ministers agreed that short-term action such as deficiency payments would ease current farm cash-flow problems, longer-term initiatives are needed to improve the profitability of the food and agriculture industry.

Agreement in principle was reached on many elements of a national agriculture and food strategy to accomplish this goal. To complete the strategy, Ministers instructed their officials to incorporate proposals resulting from discussions of the last two days. The strategy, which is the culmination of co-operative federal-provincial efforts over the past ten months, will be presented to the First Ministers' Conference in Vancouver later this fall.

Key policy areas covered by the strategy include: farm finance, disaster relief, research and technology transfer, agricultural and food products trade, soil and water conservation and national agricultural development.

The strategy is based on a full recognition that the jurisdiction and responsibility for the agri-food sector is shared between the federal and provincial governments. Ministers discussed at length and confirmed the need for greater regional equity when implementing national agricultural support programs.

The Ministers also discussed farm financing problems, noting that both levels of government had introduced measures over the past few months to reduce interest rates on farm loans, to protect farmers facing foreclosure actions and to lower farm input costs.

Ministers agreed on the desirability of enhancing the role of the Farm Credit Corporation. Federal Agriculture Minister John Wise said reducing the FCC interest rates to 9.0% was an option to be considered. Mr. Wise agreed to continued consultation with his provincial colleagues on the implementation of Farm Debt Review Boards and the Canadian Rural Transition Program.

The provincial ministers requested that the federal government consider increasing Feed Freight Assistance rates.

In spite of economic difficulties in the agri-food sector, the Ministers expressed confidence that the food and agriculture industry will continue to strengthen and to build on its already significant contribution to the Canadian economy. The agri-food industry generates more than \$50 billion in annual sales, employs about 12 percent of the nation's work force and adds between \$4 and \$5 billion to Canada's yearly trade balance.

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TRADUCTION DU SECRÉTARIAT

DOCUMENT: 830-224/040

CONFÉRENCE FÉDÉRALE-PROVINCIALE DES MINISTRES
ET DES SOUS-MINISTRES DE L'AGRICULTURE

Communiqué

Conférence

Victoria (Colombie-Britannique)
Les 26 et 27 août 1986

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ÉBAUCHE DE COMMUNIQUÉ

Pour diffusion immédiate

RÉUNION DES MINISTRES DE L'AGRICULTURE A VICTORIA

VICTORIA (C.-B.), le 27 août 1986 -- La réunion des ministres fédéral et provinciaux de l'Agriculture, tenue à Victoria, a pris fin aujourd'hui; cette réunion de deux jours a porté principalement sur les questions de commerce, la diminution des revenus des agriculteurs et un cadre de travail pour une stratégie nationale de développement agricole.

Les ministres de l'Agriculture reconnaissent que le différend sur les subventions entre les États-Unis et la Communauté économique européenne sur les marchés internationaux des produits agricoles a porté un dur coup aux revenus des agriculteurs canadiens. Pour l'industrie agricole au Canada, les pertes de revenus imputables à cette situation s'chiffrent en effet en milliards de dollars.

Les ministres sont d'avis que toutes les avenues doivent être envisagées, y compris des paiements d'appoint qui pourraient représenter plus d'un milliard de dollars, pour que les producteurs agricoles canadiens gardent leur situation concurrentielle dans l'avenir immédiat. Il y a eu engagement clair pour que des mesures soient prises afin de soutenir le secteur agricole et tous les emplois qu'il représente au cours de ce désastreux différend commercial.

Les Ministres ont convenu de préparer une proposition précise concernant la baisse des revenus des producteurs et productrices agricoles pour la réunion des Premiers ministres sur le commerce le 17 septembre.

Bien que les Ministres aient reconnue que des mesures à court terme, p. ex. les paiements d'appoint, contribueraient à réduire les problèmes actuels de liquidités dans l'industrie agricole, d'autres mesures à plus long terme s'imposent pour améliorier la rentabilité de l'industrie agro-alimentaire.

Il y a eu accord de principe sur de nombreux éléments d'une stratégie agro-alimentaire nationale en vue d'atteindre cet objectif. Afin de mettre la dernière main à cette stratégie, les Ministres ont donné instruction à leurs fonctionnaires d'ajouter les propositions découlant des discussions des deux derniers jours. Cette stratégie, qui est le fruit d'efforts conjoints des gouvernements fédéral et provinciaux depuis les 10 derniers mois, sera dévoilée à la conférence des Premiers ministres qui se tiendra plus tard cet automne à Vancouver.

Parmi les secteurs-clés de la stratégie, il y a le financement agricole; l'aide en cas de désastre naturel; la recherche et le transfert de technologie; le commerce des produits agricoles et alimentaires; la conservation du sol et de l'eau et le développement agricole national.

À la base de la stratégie, il y a la reconnaissance que la compétence et les responsabilités en matière d'agro-alimentaire sont partagées entre les gouvernements fédéral et provinciaux. Après de longues discussions, les Ministres ont confirmé la nécessité d'une plus grande équité entre les régions dans l'application des programmes nationaux d'aide agricole.

Les Ministres ont également discuté des problèmes de financement agricole; ils ont constaté que les deux ordres de gouvernement ont présenté, au cours des derniers mois, des mesures ayant pour objet d'abaisser les taux d'intérêt sur les prêts agricoles, de protéger les agriculteurs menacés de saisie et de réduire les coûts des facteurs de production agricole.

Les Ministres ont convenu qu'il était souhaitable d'accroître le rôle de la Société du crédit agricole (SCA). Le Ministre fédéral, Joe Wise, a déclaré que de ramener les taux d'intérêts de la SCA à 9 p.100 était une avenue à envisager. M. Wise accepte de poursuivre les consultations avec ses "homologues" provinciaux sur la mise en oeuvre des conseils d'examen des dettes agricoles et du Programme canadien de réorientation des agriculteurs.

Ensuite, les ministres ont discuté de l'aide au transport des céréales fourragères.

Les Ministres provinciaux ont demandé que le gouvernement fédéral songe à augmenter les montants au titre de l'aide au transport des céréales fourragères.

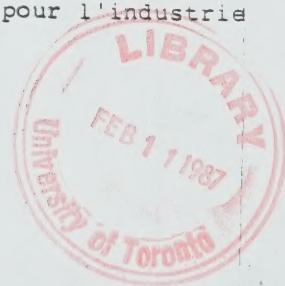
En dépit des difficultés économiques actuelles que connaît l'agro-alimentaire, les Ministres ont dit qu'ils étaient confiants que les secteurs alimentaire et agricole continueront de se raffermir et d'augmenter leur contribution déjà importante à l'économie canadienne. Les ventes de produits agro-alimentaires s'élèvent à plus de 50 milliard de dollars annuellement; ce secteur donne de l'emploi à quelque 12 p. 10 de la population active canadienne et ajoute entre 4 et 5 milliards de dollars à la balance commerciale du Canada.

FEDERAL-PROVINCIAL CONFERENCE OF MINISTERS AND DEPUTY MINISTERS
OF AGRICULTURECONFÉRENCE FÉDÉRALE-PROVINCIALE DES MINISTRES ET DES SOUS-MINISTRES
SUR L'AGRICULTUREVICTORIA, British Columbia
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LIST OF PUBLIC DOCUMENTS

LISTE DES DOCUMENTS PUBLICS

DOCUMENT NO. N° DU DOCUMENT	SOURCE ORIGINE	TITLE TITRE
✓ 830-224/021 860-184/021	Manitoba	✓ Farm Debt Review Legislation ✓ Loi sur l'examen de l'endettement agricole
✓ 830-224/022 860-184/022	New Brunswick Nouveau-Brunswick	✓ Tripartite Stabilization for the Red Meat Sector ✓ La stabilisation tripartite des prix pour l'industrie de la viande rouge
✓ 830-224/023 860-184/023	New Brunswick Nouveau-Brunswick	✓ Feed Freight Assistance ✓ Aide au transport des provendes
✓ 830-224/024	Quebec Québec	✓ Draft Speech by Mr. Michel Pagé Minister of Agriculture Fisheries and Food of Quebec ✓ Projet d'allocution de Monsieur Michel Pagé, ministre de l'Agriculture, des Pêcheries et de l'Alimentation du Québec
✓ 830-224/028 860-184/028	Newfoundland Terre-Neuve	✓ Feed Freight Assistance Program ✓ Programme d'aide au transport des céréales fourragères
✓ 860-184/033	Conference Conférence	✓ Communiqué ✓ Communiqué
✓ 830-224/037	Federal Fédéral	✓ Notes for an Address by the Honourable John Wise from the Office of the Minister of Agriculture ✓ Projet d'allocution de l'honorable John Wise du bureau du ministre de l'Agriculture



DOCUMENT NO. N° DU DOCUMENT	SOURCE ORIGINE	TITLE TITRE
860-184/037	Secretariat Secrétariat	Public List of Documents (Interprovincial Session) Liste publique des documents (Séance interprovinciale)
830-224/039	British Columbia Colombie-Britannique	The U.S. Farm Bill, U.S. Trade Policy, and World Grain Markets, Kenneth R. Farrell, Director, National Centre for Food and Agricultural Policy Resources for the Future, Washington, D.C. Le projet de loi agricole des États-Unis, la politique commerciale américaine et le marché des céréales, Kenneth R. Farrell, directeur, Centre national de la politique agro-alimentaire Ressources pour l'avenir, Washington, D.C.
830-224/040	Conference Conférence	Communiqué Communiqué
830-224/043	Secretariat Secrétariat	List of Public Documents (Federal-Provincial Session) Liste des documents publics (Séance fédérale-provinciale)

